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Summary

F. HOLLOWAY, APPLICANT, CAPE BRETON
DEVELOPMENT CORPORATION, EMPLOYER,
AND THE UNITED MINE WORKERS OF
AMERICA, DISTRICT 26.

Board File: 745-3336

Decision No.: 790

The Board found that the United Mine
Workers of America, District 26,
violated the duty of fair represen-
tation provision of the Canada
Labour Code (Part I - Industrial
Relations) (section 37) in its
handling of a grievance filed by a
former employee at Prince Mine
against his dismissal by Cape Breton
Development Corporation. The Board
ordered the union to take the
grievance to arbitration, under the
collective agreement, waived any
time limits that might stand in the
way and ordered the union to pay
compensation for lost wages should
the arbitrator uphold the grievance.

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Résumé de Décision

F. HOLLOWAY, PLAIGNANT, LA SOCIÉTÉ
DE DÉVELOPPEMENT DU CAP-BRETON,
EMPLOYEUR, ET LE SYNDICAT DES
MINEURS UNIS D'AMÉRIQUE, DISTRICT
N° 26.

Dossier du Conseil: 745-3336

Décision n°: 790

Le Conseil a jugé que la façon dont
le syndicat des Mineurs unis
d'Amérique, district n° 26, avait
traité le grief déposé par un ancien
employé de la mine Prince pour
contester son congédiement par la
Société de développement du Cap-
Breton enfreignait la disposition du
Code canadien du travail (Partie I -
Relations du travail) (article 37)
sur le devoir de représentation
juste. Le Conseil a ordonné au
syndicat de porter le grief à
l'arbitrage, en vertu de la con-
vention collective, a enlevé toute
restriction relative au délai qui
aurait pu être un obstacle et a
ordonné au syndicat de verser un
dédommagement pour les heures
perdues si l'arbitre décidait de
faire droit au grief.



Reasons for decision

Frank Holloway,
complainant,
and

United Mine Workers of
America, District 26,
respondent union.

Board File: 745-3336

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Michael Eayrs and François Bastien.

The reasons for decision were written by Vice-Chairman Thomas M. Eberlee.

Appearances:

Gary J. Corsano, for the complainant, Frank Holloway, and Susan D. Coen, for the respondent union, United Mine Workers of America, District 26.

The employer, Cape Breton Development Corporation, although provided with all notices and documentation, was not represented at the hearing.

I

Frank Holloway was employed by Cape Breton Development Corporation (Devco) as a "material man" at Prince Mine until his dismissal early in 1989. He complained to the Board on September 1, 1989 that the union, the United Mine Workers of America, District 26 (U.M.W.), had violated section 37 of the Canada Labour code (Part I - Industrial Relations) in its handling of his dismissal case.

Section 37 of the Code reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

II

The complainant, Mr. Holloway, worked for Devco in various capacities for approximately ten and a half years. His last job involved him in supplying necessary materials to miners working at the coal face in Prince Mine.

In October, 1988, Mr. and Mrs. Holloway were both charged with criminal offenses, pleaded not guilty and elected trial by judge and jury. However, as a result of negotiations between crown and defence counsel, the charge against Mrs. Holloway was dropped. It was agreed between counsel that if Mr. Holloway pleaded guilty to a charge, crown counsel would recommend a sentence which would be served on week-ends, thereby enabling him to continue working. The judge, however, surprised all parties by sentencing Mr. Holloway to four months which meant he had to be locked up immediately, for a fixed period, and he could not get leave to do his job.

Mr. Holloway was sentenced on December 19, 1988, which was also his first day of incarceration. His wife telephoned to Devco, reporting his absence from work for personal reasons. There were at that time only three working days left until the Devco Christmas shut-down and until January 3, 1989 when work resumed.

On December 19, Mrs. Holloway also telephoned Donnie MacRae, who was apparently well known to the Holloways and who was the vice-president of U.M.W.A. District 26. Their conversation, according to Mrs. Holloway, was centered around the question of whether Mr. Holloway might be able to get a permission for temporary absence from jail so that he could carry on with his job. Mrs. Holloway also testified that Mr. MacRae told her Billy Gillis, the UMWA sub-district board member responsible for the Prince Mine would be handling her husband's case.

(District 26 of the UMWA, which covers the territory of Nova Scotia and New Brunswick, has an executive consisting of seven full-time paid officers: a president, a vice-president (Mr. MacRae), a secretary-treasurer, and four sub-district board members, (one of whom was Mr. Gillis)).

During the course of their testimony, Mr. and Mrs. Holloway described several conversations with Mr. MacRae. The latter was not called as a witness at the hearing by either the complainant or the respondent union and there were no challenges of any kind to the truth of the Holloways' evidence concerning those conversations. The Board sees no reason not to accept their testimony, at least in respect of what Mr. MacRae said to them or did for them directly within their knowledge.

On December 20, Mr. Holloway telephoned Mr. MacRae and asked him for help in obtaining from Devco his vacation leave so as to cover his absence while in jail. Mr. MacRae reported to Mr. Holloway that he had been unsuccessful. Toward the end of December and early January, efforts were also made by another union officer, unsuccessfully, to obtain leave from jail for Mr. Holloway.

Devco then entered the picture formally with a registered letter to Mr. Holloway from Reg McIntyre, General Manager, Prince Colliery, dated January 9, 1989:

" A review of your attendance record shows you have been absent from work since December 19, 1988 without cause.

You are to contact me at 564-3301, within two days upon receipt of this letter. Failure to do so will result in your employment being terminated."

The letter was received at Mr. Holloway's home and opened by Mrs. Holloway who communicated its contents to her husband by telephone. On or about January 11, Mr. Holloway was allowed to telephone Mr. MacRae who advised him to write a letter to Mr. McIntyre. This would also serve as a substitute for presenting himself personally within the required two-day period.

(Article 3 of the collective agreement commits employees to regular attendance at work. The second last paragraph of the article says: "An employee who is absent without leave for eight (8) or more rostered shifts shall be notified by Registered Letter to his last known address that unless he reports to the Manager's Office within two (2) days of receipt of such letter his employment with the Corporation shall be terminated." Apparently Mr. MacRae did not feel this meant reporting to the Manager's office in person; a letter could serve the purpose. It is interesting to note that this position was also that of arbitrator Robert M. Crosby at page 5 of his McMullin arbitration, dated March 29, 1988, where he said: "The fact that the Grievor wrote to his supervisor should have been considered proper reporting." This arbitration decision was supplied to the Board by the U.M.W.A.)

In any case, Mr. Holloway dispatched a letter to General Manager McIntyre. He also telephoned Mr. McIntyre, explained his situation and asked for his vacation so that his absence from work would be covered. During the telephone conversation, Mr. McIntyre told him he was reviewing his (Mr. Holloway's) work record and to phone him again later. Mr. Holloway did so; Mr. McIntyre then told him that his job was available and that there was nothing he could do regarding holidays.

In a further telephone conversation with union vice-president MacRae, the latter advised Mr. Holloway to file a grievance.

However, the wheels of bureaucracy continued to grind ahead inexorably. First, Mr. Holloway received a letter from General Manager McIntyre dated January 16, 1989 which told him:

"I am in receipt of your letter of Jan. 11, 1989, which requested that the decision to terminate your employment be reversed.

Your absence for work is a violation of Article 3 of the Collective Agreement, therefore, I have no alternative but to terminate your employment."

A second letter, dated the same day, made sure that the message sank home:

"In a letter dated Jan. 9, 1989, you were asked to contact me within two days of receipt of the letter to establish the reason you have been absent from work since December 19, 1988.

It has now been established that you are unable to maintain regular attendance at work, as outlined in Article 3 of the Collective Agreement.

This letter will serve as notice of termination of your employment with the Cape Breton Development Corporation effective January 13, 1989."

Mr. Holloway was again in touch with Mr. MacRae who undertook to send him a blank grievance form so he could file a grievance. This was done and Mr. Holloway filled out the form and returned it to Mr. MacRae. Mr. Holloway testified that Mr. MacRae undertook to pass the grievance on to sub-district board member Billy Gillis who would be handling it. The grievance signed by Mr. Holloway is dated January 24, 1989.

Whether it was handed in to Devco by Mr. MacRae or by Mr. Gillis, it did come into Devco's hands. Once Devco had it, in accordance with the usual practice, the grievance was typed in the employee relations unit on a quintuplicate form. Two copies were retained by the employer, one was sent to the mine committee, one to the union (Prince Local 2183) and one to the grievor. According to the report of the Board's investigating officer, which is in the possession of all parties, Devco officials say that the copies for the mine committee and the union were, in this instance, sent to them by mail. Mr. Holloway's copy was also mailed to him and he received it.

Prince Mine General Manager McIntyre replied to the grievance on February 3, 1989 and denied it on the basis that Mr. Holloway had "been in violation of Article 3 of the Collective Agreement since Dec. 19, 1988".

Again, according to the Board's investigating officer, Devco states that copies of the reply were mailed to the mine committee and the union local, as well as to Mr. Holloway. The latter received his.

The very day that Mr. Holloway filed his grievance, January 24, 1989, the Devco Railway employees, represented by the International Association of Machinists, began a legal

strike. The employer then laid off the bulk of the work force, including employees of Prince Mine.

As soon as he received the February 3 reply from Mr. McIntyre, Mr. Holloway telephoned Vice-President MacRae. The latter told him that because of the I.A.M. strike and the lay-off of the U.M.W.A. employees business would not be going on as usual between the U.M.W.A. and Devco. His grievance would therefore not be dealt with further until the stoppage ended.

On March 19, 1989, Mr. Holloway was released from jail. He waited until April 18, when the stoppage concluded, before pressing the union concerning his grievance. On April 20, he tried to contact sub-district board member Gillis and left a message on his answering machine. He did get through to Mr. Gillis the next day. He testified that he recognized Mr. Gillis' voice. He explained the situation to Mr. Gillis, who advised him that he (Mr. Gillis) would bring the case before the Prince local at its meeting two weeks hence.

After a further three weeks, with no word from Mr. Gillis, Mr. Holloway telephoned Mr. Gillis again in May. According to Mr. Holloway, this was an acrimonious conversation. Mr. Gillis promised again that he would discuss the case at the next Prince local meeting. Again, nothing happened.

Efforts were made by Mr. Holloway to arrange a meeting with Mr. Gillis and it was not until June 26 that they were successful. This meeting took place in the union's Glace Bay office, with Mr. and Mrs. Holloway, Mr. Gillis and District 26 secretary-treasurer, Bill Corbett, in attendance. Mr. Holloway testified that he asked Mr. Gillis why the union was not taking the case to arbitration

and Mr. Gillis replied that the grievance was outside the time limits.

Messrs. Gillis and Corbett agreed to bring the case before the Prince local at a meeting on July 6, which did in fact occur. Mr. Holloway attended that meeting and asked the local to approve the referral of his grievance to arbitration. The following is an extract from the minutes of the local meeting:

"Old Business

Brother Holloway spoke to the members. He said he had a letter from the manager that he was terminated while he was off he was denied vacation pay.

Brother Gillis said he met with him and Reg MacIntyre (sic) and he said it was because of his work record. Brother Corbett said he and Bill Gillis met with him and his wife at the District Office.

Brother Holloway questioned what was wrong with his work record.

Brother Bill Gillis said he cannot take anything without the consent of the local. Reg MacIntyre (sic) said he is not in the habit of paying vacations in January.

Brother Young said he couldn't understand why the Brother went to Don MacRae. Brother Holloway said he had limit of phone calls and he called Don MacRae.

Brother MacRae called Brother Gillis. Brother Gillis said he never received the grievance until he got a copy from management.

Brother Noble said he always gets a copy of grievances and yours never came to the local.

Brother Young said we always get a copy of the grievance and it was a standing order that we take the case.

Moved and seconded that the case go back to the District to try and straighten out the case of Brother Holloway."

On July 11, Mr. Holloway contacted Mr. Gillis who told him that the District 26 executive board had decided they would not proceed with his grievance. He received confirmation of this decision in a letter dated August 14, 1989. it provided no reasons for the decision.

Mrs. Holloway also testified. She told the Board that she had several telephone conversations with Vice-President MacRae in December, 1988, and January, 1989. She said that she spoke to Mr. Gillis twice before her husband filed his grievance on January 24. She remembered explaining to Mr. Gillis her husband's situation and that Vice-President MacRae had tried to obtain vacation for him. She thought she had suggested to Mr. Gillis that he call or go in to see Mr. Holloway in jail. She testified that she told him her husband had filled in a grievance form and had sent it to Vice-President MacRae. She presumed that Mr. Gillis would be in touch with Mr. MacRae to get a copy of it. She testified that she was "flabbergasted" when Mr. Gillis said at the June 26 meeting that he didn't remember talking to her earlier. She confirmed that her husband tried to reach Mr. Gillis in April and she was standing near him in the kitchen of their home on April 21 when he talked to a person on the telephone as if that person were Mr. Gillis and she assumed it was in fact Mr. Gillis.

Mr. Gillis testified at length for the union. He conceded that he talked to Mrs. Holloway by telephone around January 26. He also conceded that Mr. MacRae had called him and had told him that the grievance had been filed and that Mr. MacRae had said he had told Mrs. Holloway that Mr. Gillis would be handling it. He told the Board that he would have had to know what the answer was to the grievance before he could have acted. He claimed he never saw a copy of the grievance itself nor was he aware of the company's reply, until June 27, despite the company apparently having supplied copies of both the grievance and the reply to the mine committee and to the local union, as per usual practice, in January and February. (This, according to the Board's investigating officer's report, is what company

officials told him had occurred. There was no challenge by anybody to this part of the officer's report and we take it to be a fact that the grievance and the reply were mailed to the mine committee and the union.)

Mr. Gillis stated that his first conversation with Mr. Holloway was around June 14. He said he did not find out that Mr. Holloway was out of jail until that time. He denied having any conversation with Mr. Holloway in April immediately after the work stoppage ended.

On the other hand, Mr. Gillis admitted that General Manager McIntyre had mentioned something to him late in April (around April 25) about there being a grievance from Mr. Holloway; he then raised the matter at a meeting of the local on May 4. The minutes record his report as follows:

"... He said there were 2 brothers fired, and he will talk to the Manager. The grievance of Frank Holloway and 2 outstanding."

Mr. Gillis told the Board that Mr. Holloway's grievance was still outstanding because they had no answer to the grievance from the manager. "You couldn't proceed on something you didn't have," he told the Board. However, he took no steps himself to find out whether there was an answer or what it might have been. Besides, the mine committee and Mr. Holloway had to have a meeting before anything could be done. He took no steps toward arranging such a meeting.

In cross-examination, Mr. Gillis testified that he had known since January, because of information provided to him by Mr. MacRae, that Mr. Holloway had been dismissed. He also knew there was a grievance. He didn't do anything about it because the work stoppage was under way and

relations with Devco were suspended. Moreover, he didn't have a copy of the grievance, nor was he aware of a company reply to the grievance. At the end of April, Mr. McIntyre told him Holloway had been dismissed. He didn't ask Mr. McIntyre for a copy of the company's reply to the grievance then because he expected the company would give him a copy later. But he never asked for this until June 27. Why not? Because Devco usually sends out such documents. The union never has to ask for them.

Mr. Gillis told the Board that on June 14, in a phone conversation, he told Mr. Holloway he couldn't take the grievance until he had a motion from the local union. He conceded that at the June 26 meeting he stated that "we could be in trouble with the time limits". But he wasn't sure because he didn't have the file. Then he changed his mind about the problem of time limits because, in his opinion, there had been no answer to the grievance from the mine manager and the grievance would not be out of time until 14 days after they received that answer.

On June 27, Mr. Gillis had a meeting with Mr. McIntyre. He testified that he raised the question of Mr. Holloway's vacation but Mr. McIntyre reiterated his position that it had not been possible in January to give Mr. Holloway the vacation. The minutes of that meeting say:

"W. Gillis asked why Mr. Holloway was not provided vacation. R. McIntyre said he made that decision. It is not the practice to give vacation in January particularly under these circumstances."

It appears that there was still no discussion of the grievance or the dismissal itself between Mr. Gillis and Mr. McIntyre.

Mr. Gillis testified that he asked at the union local meeting on July 6 if anybody had received a copy of Mr. Holloway's grievance or any answer to it and nobody had. This was why the matter was referred to the district executive board meeting of July 11. He told the Board that at the executive board meeting the decision not to proceed with the grievance was based on a belief that it could not be won at arbitration. It had nothing to do with any question of timeliness.

III

The evidence shows that responsible officers of the union knew from January, 1989 onwards that Mr. Holloway had been dismissed by Devco. Mr. MacRae, the vice-president, knew and so did Mr. Gillis, the sub-district board member. The evidence indicates that responsible officers of the union knew at the end of January that Mr. Holloway had filed a grievance. Mr. Holloway says, in fact, that he sent the grievance to Mr. MacRae. It seems probable that the latter passed it on to Devco. We know directly that it came into Devco's hands and we have no reason to doubt Mr. Holloway's explanation of how that came about. We also have Mr. Gillis' own testimony that he knew a grievance had been filed.

It seems strange that the final, typed version of the grievance, which was sent out by mail by Devco to Mr. Holloway, the mine committee and the local union, after it was filed on January 24, 1989, was received by Mr. Holloway, but allegedly not by the mine committee or by the local union. Equally strange is the fact that the manager's reply to the grievance, dated February 3, 1989, which was also sent out by mail by Devco to Mr. Holloway, the mine committee and the local union was also received by Mr. Holloway, but allegedly not by the mine committee

or by the local union. Perhaps U.M.W.A. officers were not opening mail from Devco during the period of the I.A.M. strike and the lay-off.

Once the work stoppage ended around April 18, 1989 and relations returned more or less to normal between Devco and the U.M.W.A., Mr. Holloway's case did not become completely forgotten. Mr. Gillis concedes that Mr. McIntyre raised it with him around the end of April and then he mentioned it to the May 4 meeting of the local.

Having heard the testimony of Mr. and Mrs. Holloway and that of Mr. Gillis and having had an opportunity to see them in the witness stand, we conclude it is more probable that Mr. Holloway did attempt to contact Mr. Gillis once the strike/lay-off had ended around April 18 and that he did in fact have the conversations with Mr. Gillis on or about April 21 and again later in May that have been outlined earlier.

Even if, by the time he was on the witness stand at the Board's hearing, Mr. Gillis had completely forgotten about those conversations, and that is why he denied they had occurred, it is still clear from his own testimony that he knew throughout the period that Mr. Holloway had been dismissed and that a grievance had been filed even if he did not actually have a copy of the grievance in his own hands. He also undoubtedly knew what the company's response to that grievance was: it was obvious that the company had rejected it, for Mr. Holloway had not been taken back to work. That must have been apparent to Mr. Gillis, for example, when Mr. McIntyre raised the Holloway case with him on April 25, 1989, even though he did not actually have a copy of the official response.

Mr. Holloway had clearly been led to believe that Mr. Gillis would be handling his case. Moreover, Mr. Gillis' own testimony indicates that as early as his conversation or conversations with both Mrs. Holloway and Mr. MacRae he knew the Holloways were expecting him to handle Mr. Holloway's case, as did Mr. MacRae. His explanation for his particular mode of "handling" the case between the end of the lay-off in late April and the meeting with the Holloway's on June 26, 1989 was that he didn't have the grievance and he didn't have the response from the mine manager. He did not take the not very difficult step of asking for them, even when he was reminded by General Manager McIntyre of the Holloway case at the end of April.

The union would have us conclude that it did not know officially what the General Mine Manager's decision was on Mr. Holloway's grievance until June 27, 1989 (although rendered on February 3, 1989), and that the 14-day time limit for deciding whether to take the grievance to arbitration ran from June 27, not from some earlier point in time. Thus the grievance was still capable of being arbitrated when the District 26 executive board met on July 11. The union's position then is that it turned its mind to the grievance, particularly by reviewing certain arbitration decisions having to do with Article 3 of its collective agreement, decided that Mr. Holloway's grievance could not be won at arbitration and therefore dropped it.

According to Mr. Gillis' own testimony, he was of the opinion that the grievance was untimely when he met the Holloways on June 26 and then he changed his mind later. We think - based on the language of the collective agreement and the testimony of Pauline Hillier, Devco employee relations manager - that he was right the first time and that because of the fact he had done nothing about

it since the end of the lay-off around April 18 - despite having been asked by Mr. Holloway on April 21 and having his memory jogged by General Manager McIntyre on April 25 - it had become untimely by the end of June. Its obvious untimeliness cannot be countered by an appeal to such a technical argument as the one that the union would like us to accept. It is our finding that the union's handling of the grievance up to the end of June, 1989, was so seriously negligent as to constitute a violation of section 37.

Finally, even if we were to stretch our imaginations to the extent of accepting the technical argument about timeliness, we could not be persuaded that the decision made by the District 26 executive board on July 11 was based upon any real turning of the mind to Mr. Holloway's case. In the case, Canadian Merchant Service Guild v. Guy Gagnon et al, [1984] 1 S.C.R. 509; and (1984), 84 CLLC 14,043, the Supreme Court of Canada said that an employee does not have an absolute right to have his grievance arbitrated, that the union has considerable discretion to take or not to take a grievance to arbitration. However, the Court said:

"3. The discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(pages 527; and 12,188)

The union filed with the Board before the hearing a number of arbitration cases which, it claimed, had been reviewed by the executive board at the July 11 meeting prior to the decision to drop the grievance. These arbitration awards had gone against the union in article 3 cases. Hence the union did not consider Mr. Holloway's grievance winnable.

The Board has reviewed these awards. (They include the McNullin award mentioned on page 4.) They outline fact situations and conclusions which are in each instance quite different from that of Mr. Holloway's case. The Board considers them to be largely irrelevant to Mr. Holloway's case.

We cannot see how the review by the union of several largely irrelevant arbitration awards can provide a sound basis for coming to a conclusion that a particular grievance could not be won at arbitration. That is surely not an exercise that satisfies the foregoing principles enunciated by the Supreme Court.

In the past, the Board has said, in effect, that a union does not violate section 37 even if it makes a wrong decision - or at least a decision that the Board panel might reasonably think was wrong - on such a question as assessing whether a grievance was winnable, so long as in coming to its conclusion it turns its mind carefully and conscientiously to the issues involved. In this case, however, we cannot overcome the strong impression that the July 11 meeting was simply an exercise of going through certain motions to try to justify conduct after the fact. Bearing in mind the whole background to the July meeting, and the factors that the union says were considered at the meeting, we think the decision was so unreasonable that the

union could not have come to it via any route consistent with the principles referred to in the Supreme Court ruling.

In the final analysis, our view of what happened here is that the union was seriously negligent in its handling of Mr. Holloway's grievance. We have the sense that it did not really want to do anything to counter Mr. Holloway's dismissal and that at the end, because Mr. Holloway did not simply drop the matter, it went through the exercise of the July 11 meeting. We find, taking all the evidence into account, that the union violated section 37 of the Code.

IV

Section 99 of the Code empowers the Board to order what shall be done by a union to remedy a contravention of section 37. Under section 99, the Board orders District 26 of the United Mine Workers of America to take the January 24, 1989 grievance of Mr. Holloway to arbitration under the provisions of the collective agreement; any time limits are to be waived in order to permit the matter to be decided on its merits. In accordance with the proposal of the complainant's counsel that no outside counsel be required, the Board directs that Mr. Holloway's interests be represented by one of the union's counsel.

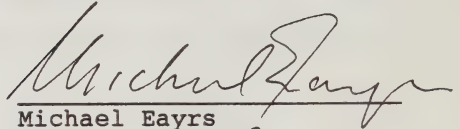
Should Mr. Holloway's grievance be upheld in whole or in part and should the arbitrator determine that Mr. Holloway is entitled to compensation for any wages lost between his dismissal and the date of the award of the arbitrator, that compensation shall be paid by the union.

The Board appoints John Vines, Atlantic Regional Director and Registrar, or a person designated by him, to assist the

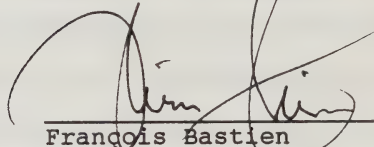
parties to implement the Board's order. The Board will remain seized of these matters so as to deal with any problem that may arise in connection with this order and to issue a formal order should such be necessary.



Thomas M. Eberlee
Vice-Chairman



Michael Eayrs
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa this 10th day of April 1990.

information

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Summary

MR. ROBERT J. TOOLE, APPLICANT, CANADIAN NATIONAL RAILWAY COMPANY, HALIFAX, N.S., EMPLOYER, AND MR. D.A. HICKS, SECURITY OFFICER.

Board File: 950-140

Decision No.: 791

Ce document n'est pas officiel. Les motifs de décision seulement peuvent être utilisés aux fins légales.

Résumé de Décision

M. ROBERT J. TOOLE, REQUÉRANT, LA COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA, HALIFAX (N.-É), EMPLOYEUR, ET M. D.A. HICKS, AGENT DE SÉCURITÉ.

Dossier du Conseil: 950-140

Décision n°: 791

This case deals with a referral of a safety officer's decision to the Board pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

The applicant had been assigned to operate a locomotive in which there was seating for himself and two other persons. A fourth person, a CN supervisor, was assigned to the same locomotive for the day in question. The applicant refused to operate the locomotive with the supervisor standing in the cab. A safety officer, following an investigation, decided that the situation did not involve danger within the meaning of the Code.

Having considered all of the evidence, the Board found that the presence of a supervisor standing in the cab of the locomotive did not constitute a danger, within the meaning of the Code, to any of the persons in the cab. Therefore, the Board is satisfied that the safety officer's decision was correct and should be upheld.

Il s'agit d'un renvoi d'une décision d'un agent de sécurité au Conseil en vertu du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Le requérant a été affecté à une locomotive où il y avait des sièges pour lui et deux autres personnes. Une quatrième personne, un surveillant du CN, a été affectée à la même locomotive cette journée-là. Le requérant a refusé de faire fonctionner la locomotive pendant que le surveillant se tenait debout dans la cabine. Après enquête, un agent de sécurité a décidé que la situation ne comportait aucun danger au sens du Code.

Après avoir examiné tous les éléments de preuve, le Conseil a jugé que le fait qu'un surveillant se tenait debout dans la cabine de la locomotive ne constituait pour aucune des personnes présentes un danger au sens du Code. Par conséquent, le Conseil est convaincu que la décision de l'agent de sécurité est juste et doit être maintenue.



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Canada
Labour
Relations
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Conseil
Canadien des
Relations du
Travail

Reasons for decision

Robert J. Toole,
applicant,
and
Canadian National Railway Company,
employer,
and
Transport Canada,
interested party.
Board File: 950-140

The Board was composed of Mr. Michael Eayrs, Member, sitting as a single member pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. Robert J. Toole, accompanied by Mr. Bradford Wood, for the applicant;
Mr. Myer Rabin, accompanied by Mr. Gregory C. Blundell, for the employer; and
Mr. D.A. Hicks, Safety Officer.

Heard at Halifax, Nova Scotia, March 15, 1990.

I

This is a referral of a safety officer's decision to the Board pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

There is no dispute with respect to the specific events giving rise to this referral which occurred on January 15, 1990 nor with respect to the procedures taken by the applicant, the employer or the safety officer. These can be summarized as follows:

The applicant, Mr. Toole, is an experienced engineman. He has been employed by CN Railway for approximately 15 years, 11 of which have been as an engine service employee.

On January 15, 1990, engineman Toole, yard foreman Thomas, and yard helper Hubley were assigned, at Rockingham N.S., to a locomotive, CN unit 1752. A fourth person, CN supervisor McDonald, a member of a Yard Productivity Study Team, was also assigned to accompany the three employees and observe the activities of the crew as part of an ongoing Terminal Productivity Study being conducted by CN Rail.

At some point in the shift, unit 1752 was to travel from Rockingham (at mile 6) to Halifax Ocean Terminal (at mile .04). Messrs. Thomas and Hubley were to travel in the cab of the locomotive for a transfer and Mr. McDonald was to travel in the cab in connection with his study assignment.

Unit 1752 is equipped with three seats (an engineman's seat behind the engine control stand and two additional seats).

About two hours into the shift Messrs. Thomas and Hubley entered the cab of unit 1752 and were seated in the two additional seats. Mr. Toole was seated in the engineman's seat and Mr. McDonald assumed a standing position against the electrical control stand.

At this point Mr. Toole decided that it was unsafe to proceed to Halifax Ocean Terminal with a person, namely Mr. McDonald, standing in the cab. He advised the General Yard Manager, Mr. Allison Zinck, of his decision. Mr. Zinck removed Mr. McDonald from the cab of unit 1752 and

Messrs. Toole, Thomas and Hubley continued work in the yard at Rockingham.

In response to its question, the Board was advised that following his removal, Mr. McDonald did not re-enter the cab of unit 1752.

Approximately two hours later, Mr. Toole discussed the matter with CN Trainmaster Paul Penney and stated his refusal to continue operating the locomotive with a fourth person in the cab.

Mr. Penney promptly convened a meeting to discuss the matter. In addition to Messrs. Penney and Toole, the meeting was attended by Messrs. Don Pinnell and Bradford Wood (members of the Health and Safety Committee) and Mr. Cecil Morton (a CN supervisor).

Mr. Toole maintained his opinion that operation of the locomotive with a person standing in the cab did, in the event of a collision, derailment or emergency situation, create a potential danger to himself, the other persons seated in the cab and the person standing in the cab.

He considered that in the circumstances he was entitled to exercise his right pursuant to section 128(1) of the Code. That section provides as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

The matter was then reported to Mr. D. Mullins of the Rail Safety Branch of Transport Canada who, pursuant to section 129 of the Code, appointed Rail Safety Officer No. 2781, Mr. D.A. Hicks, a safety officer within the meaning of Part II of the Code, to investigate the matter in the presence of the employer and employee.

Mr. Hicks travelled to Rockingham and, on the morning of January 16, 1990, conducted his investigation in the presence of a representative of CN, Mr. Toole and Mr. Pinnell. Mr. Hick's investigation included an inspection of the cab of unit 1752.

Following his investigation, Mr. Hicks rendered a verbal decision which he confirmed in writing on January 17, 1990.

The pertinent portion of his written decision reads as follows:

"The 'condition' as per Mr. Toole's statement was based on the fact unit 1752 was equipped with three seats and a fourth person travelling in the cab presented a potential danger to him and his fellow employees should a derailment, collision or emergency situation occur.

Danger is defined under the Code as follows: 'any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition could be corrected.'

The danger must be immediate and real and one that is intended to be covered under the Code. Therefore within the spirit of the Code it becomes quite clear why danger is defined as such.

A fourth person standing in a locomotive cab, or in general a person standing in rolling stock designed for transporting employees, is not an uncommon occurrence within the rail industry.

Situations whereby employees are assigned to crews for training periods, track maintenance personnel accompanying train and engine movements, or trainmen performing functions in the cab of railiners are all examples when a person may stand due to limited seating. The condition in question is similar to these. I fail to see how any of these circumstances would create a 'dangerous condition' as intended by the Code."

On January 22, 1990, Mr. Toole, as he was entitled to do pursuant to section 129(5) of the Code, required Mr. Hicks to refer his decision to the Board, which Mr. Hicks then did.

II

At the hearing, Mr. Toole testified in support of his position and submitted written documentation and argument.

Although admitting he was aware of frequent situations in which a person or persons might stand in a moving locomotive, and did not recall any accident or injury resulting from those situations, he maintained his position that the presence of a fourth person (standing) in the cab of unit 1752 on the day in question caused "real" danger to himself and the other three persons in the cab, and his refusal to work was therefore justified.

When questioned about knowledge of any union discussions with respect to the productivity study in general or Mr. McDonald's specific assignment of January 15, 1990, Mr. Toole replied that he had none.

In support of his position, Mr. Toole relied, in part, on articles 10.15 and 10.16 of the "On-Board Trains Safety and Health Regulations", dated March 26, 1987, which read as follows:

"10.15 Rolling stock shall not be used for transporting or positioning an employee unless the rolling stock is designed for that purpose.

10.16 Where seating is provided for employees on rolling stock, it shall be securely installed and, where reasonably practicable, upholstered with a material that breathes."

Mr. Toole further relied on a document dated February 2, 1990, entitled "Regional Notice 007/90", the subject of which was designated "Locomotive Seating Arrangements in Either Caboose or Cabooseless Operations".

That document provided instructions with respect to seating in certain specific operating situations and the unsigned copy provided by Mr. Toole indicated that it was issued by Mr. S.L. Pound, District Superintendent.

Mr. Pound testified at the hearing that the document dated February 2, 1990 was not intended for situations such as the one which arose on January 15, 1990.

The Board also notes that the document referred to above was issued after January 15, 1990 and does not consider it pertinent to the matter before it.

III

The employer took the position that the decision of the Safety Officer should be confirmed. In support of its position, the employer adduced evidence from two experienced witnesses to the effect that it was indeed common practice in many situations for an additional person or persons to stand in the cab of a moving locomotive. None of the witnesses recalled any accident or injury resulting from the presence of a person standing in the cab of a locomotive. The employer also adduced evidence that the immediate removal of Mr. McDonald from the cab on the day in question resulted from a standing instruction to the yardmaster to do so if the presence of a member of the productivity study team was contested by an employee or employees.

The employer argued, firstly, that the practice leading to Mr. Toole's refusal is a normal condition of employment within the meaning of section 128(2)(b) of the Code, which reads as follows:

"128.(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where

...

(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment."

Secondly, the employer argued that Mr. Toole's refusal on the day in question may have been motivated in part by considerations other than health and safety, arising from Mr. McDonald's assignment with respect to productivity.

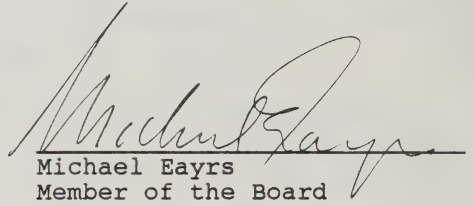
Thirdly, the employer argued that the danger complained of was not sufficiently serious to justify Mr. Toole's refusal to work on January 15, 1990.

IV

With respect to the employer's contention that there may have been considerations other than those of health and safety which prompted Mr. Toole's refusal, the Board has no definitive evidence before it on which to base any finding.

Having reviewed all the evidence and submissions, the Board is satisfied that the presence of a supervisor standing in the cab of unit 1752 on January 15, 1990 did not constitute a danger, within the meaning of the Code, to Messrs. Toole, McDonald, Thomas or Hubley.

The Board is satisfied that Mr. Hicks made the correct determination in the circumstances. Accordingly, Mr. Hick's decision of January 17, 1990 is confirmed.



Michael Eayrs
Member of the Board

ISSUED at Ottawa this 12th day of April 1990.

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Summary

SYNDICAT DES TRAVAILLEURS(EUSES)
DE LAROSE-PAQUETTE (CNTU) AND MR.
WILLIAM QUÉREL ET AL., COMPLAINANTS
AND LES AUTOBUS VAL NORD LIMITÉE,
LAROSE-PAQUETTE AUTOBUS INC.,
AUTOBUS ST-EUSTACHE INC., LOCATION
TRANS-NORD INC., RESPONDENT
EMPLOYERS; NETTOYAGE SLY SHINE INC.
RESPONDENT; AQUA LAVE INC., MIS EN
CAUSE AND THE TRANSPORT DRIVERS,
WAREHOUSEMEN AND GENERAL WORKERS
UNION, LOCAL 106 INTERVENER.

Board Files: 530-1779
560-233
585-356
745-3346
745-3425
745-3434

Decision No.: 792

Application for a declaration of
single employer (section 35 of the
Canada Labour Code - Part I);
application for a declaration of
a sale of business (sections 44 and
45 of the Code) and unfair labour
practice complaints (sections 24(4)
and 94(3)(a) of the Code) filed by
the Syndicat des
travailleurs(euses) de Larose-
Paquette (CNTU) against companies
associated with the Groupe Larose-
Paquette Autobus. This group
consists of the five following
businesses: Paquette, which
provides only interprovincial bus
transportation services; Val Nord,
which provides school
transportation and urban
transportation services as well as
local transportation of the
handicapped; Blainville, which
provides school bus transportation
services; St-Eustache, which is
responsible for the management of
the group and Location, which owns
and leases vehicles.

Ce document n'est pas officiel.
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peuvent être utilisés à des fins
juridiques.

Résumé de Décision

SYNDICAT DES TRAVAILLEURS(EUSES)
DE LAROSE-PAQUETTE (CSN) ET M.
WILLIAM QUÉREL ET AUTRES,
PLAIGNANTS, ET LES AUTOBUS VAL NORD
LIMITÉE, LAROSE-PAQUETTE AUTOBUS
INC., AUTOBUS ST-EUSTACHE INC.,
LOCATION TRANS-NORD INC.,
EMPLOYEURS INTIMÉS, ET NETTOYAGE
SLY SHINE INC., INTIMÉE, ET AQUA
LAVE INC., MISE EN CAUSE ET L'UNION
DES CHAUFFEURS DE CAMIONS, HOMMES
D'ENTREPOS ET AUTRES OUVRIERS,
SECTION LOCALE 106, INTERVENANTE.

Dossier du Conseil: 530-1779
560-233
585-356
745-3346
745-3425
745-3434

No de Décision: 792

Demandes de déclaration d'employeur
unique (article 35 du Code canadien
du travail - Partie I) et vente
d'entreprise (art. 44 et 45 du
Code) et plaintes de pratiques
déloyales (art. 24(4); 94(3)a))
déposées par le Syndicat des
travailleurs(euses) de Larose-
Paquette (CSN) contre des
entreprises liées au Groupe Larose-
Paquette Autobus. Le Groupe est
formé de cinq sociétés: Paquette
qui assure seulement du transport
interprovincial par autocar; Val
Nord qui assure du transport
scolaire et urbain ainsi que du
transport local de personnes
handicapées; Blainville qui assure
du transport scolaire; St-Eustache
qui s'occupe de la gestion des
entreprises du Groupe; Location qui
possède des véhicules et les loue.



CONSTITUTIONAL JURISDICTION. Detailed analysis of the jurisprudence. These various companies are separate entities under constitutional jurisdiction; only Paquette is a federal business.

THE APPLICATION FOR A SINGLE EMPLOYER DECLARATION was rejected since only one federal business was involved (Canada Labour Code, section 35).

THE APPLICATION FOR A DECLARATION OF A SALE OF BUSINESS was also rejected. Only the vendor falls under federal jurisdiction. The Board concluded that since the alleged purchaser, Val Nord, is not under federal jurisdiction, the declaration for a sale of business cannot be allowed. The Board commented on the legislative vacuum that exists with respect to the sale of businesses falling under different constitutional jurisdiction.

UNFAIR LABOUR PRACTICE COMPLAINT. SECTION 24(4) OF THE CODE - FREEZE PROVISIONS - rejected. While an application for certification by the CNTU, during a raid attempt against the Teamsters, was still pending, Paquette transferred a portion of its activities to an associated company, Val Nord. These activities, each one consisting of the municipal transportation of handicapped persons, are not related to Paquette's charter activities. In this case, Paquette transferred 22 drivers to Val Nord. The Union alleges violation of section 24(4). A collective agreement was in force at Paquette at the time of the transfer. Having reviewed the collective agreement, the Board rejected the complaint. The union had not filed a grievance and the collective agreement provided for lay-offs. Although the Board is of the opinion that the transfer was motivated by anti-union animus, the union did not invoke section 94(3)(a)(i) of the Code.

JURIDICITION CONSTITUTIONNELLE. Revue détaillée de la jurisprudence. Ces différentes sociétés constituent des entreprises distinctes au plan constitutionnel. Seule Paquette est fédérale.

DEMANDES DE DÉCLARATION D'EMPLOYEUR UNIQUE. Rejetée vue qu'une seule entreprise fédérale est visée (Code canadien du travail, article 35).

DEMANDE DE VENTE D'ENTREPRISE. Rejetée. Seul le vendeur est sous juridiction fédérale. Le Conseil conclut que l'acquéreur allégué - Val Nord - ne relevant pas de juridiction fédérale, la demande de vente d'entreprise ne peut être accueillie. Commentaire du Conseil sur le vide législatif dans les cas de ventes entre entreprises soumises à des compétences constitutionnelles différentes.

PLAINTÉ DE PRATIQUE DÉLOYALE. PARAGRAPHE 24(4) DU CODE: GEL DES CONDITIONS DE TRAVAIL - rejetée. Alors qu'une demande d'accréditation de la CSN visant à marauder les Teamsters était pendante, Paquette a cédé une partie de ses activités à une société-soeur, Val Nord. Ces activités, toutes de transport municipal de personnes handicapées, sont indépendantes des activités de transport par charte-partie de Paquette. A cette occasion, Paquette a «transféré» 22 chauffeurs chez Val Nord. Le syndicat allègue violation du paragraphe 24(4). Une convention collective était en vigueur chez Paquette au moment du transfert. Après étude de la convention collective, le Conseil rejette la plainte. Aucun grief n'avait été fait par le syndicat et la convention collective prévoyait la possibilité de licenciements. Le Conseil juge que le transfert était entaché de sentiment anti-syndical, mais le syndicat n'a pas invoqué l'alinéa 94(3)a)(i) du Code.

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UNFAIR LABOUR PRACTICE COMPLAINT.
SECTION 94(3)(a)(i). Allowed. A union representative, Mr. W. Quérel of the CNTU was transferred from Paquette to Val Nord. Val Nord is covered by the Teamsters collective agreement. The employer demanded that Mr. Quérel immediately sign a Teamsters membership card. Mr. Quérel refused and was fired. The transfer was motivated by anti-union animus and the complaint is allowed. The Board concluded that this transfer constituted in fact a dismissal from Paquette and ordered remedial action.

COMPLAINT OF DISMISSAL UNDER SECTION 94(3)(a)(i) against Sly Shine Inc. Since the evidence did not demonstrate the federal nature of the business, the complaint was rejected.

PLAINTE DE PRATIQUE DÉLOYALE.
ALINÉA 94(3)a)(i). Accueillie. Un dirigeant syndical, M. W. Quérel, de la CSN faisait partie du groupe transféré de Paquette à Val Nord. Val Nord est assujettie à une convention collective détenue par les Teamsters. L'employeur a exigé de M. Quérel qu'il signe immédiatement une carte d'adhésion aux Teamsters. Devant le refus de l'employé, celui-ci a été congédié. Le transfert était entaché de sentiment anti-syndical et la plainte est accueillie. Le Conseil a jugé que le «transfert» constituait un renvoi de chez Paquette. Le Conseil a ordonné des mesures réparatrices.

PLAINTE DE CONGÉDIEMENT EN VERTU DE L'ALINÉA 94(3)a)(i) contre Sly Shine Inc. La preuve n'ayant pas démontré le caractère fédéral de cette entreprise, la plainte est rejetée.

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Reasons for decision

Syndicat des travailleurs(euses)
de Larose-Paquette (CNTU),
William Quérel et al.,

complainants,

and

Val Nord Bus Lines Limited,
Larose-Paquette Autobus Inc.,
Autobus St-Eustache Inc.,
Location Trans-Nord Inc.,

respondent employers,

and

Nettoyage Sly Shine Inc.,

respondent,

and

Aqua Lave Inc.,

mis-en-cause,

and

Transport Drivers, Warehousemen
and General Workers' Union,
Local 106,

intervener.

Board Files: 530-1779
560-233
585-356
745-3346
745-3425
745-3434

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Ginette Gosselin and Mr. Robert Cadieux, Members.

Appearances:

Mr. Maurice Laplante, assisted by Mr. Gilles Girard, for the
Syndicat;

Mr. Roland Pepin, assisted by Ms. Claire Duthé, head
dispatcher, for the respondent employers; and

Mr. Robert Castiglio and Ms. Claire Fortin, for the
intervener.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

THE PROCEEDINGS

This case deals concurrently with multiple proceedings instituted by the Syndicat des travailleurs(euses) de Larose-Paquette (CNTU) (the union or the CNTU), by William Quérel, its secretary, and by Alain Mazerolle (the complainants) against one or another of the parties named above as employers. Local 106 of the Transport Drivers, Warehousemen and General Workers' Union (the Teamsters) is the intervener.

The Board heard joint proof in all these proceedings in which it is alleged, first, that the dismissal of William Quérel and Alain Mazerolle contravenes sections 94(1)(a) and 94(3)(a) of the Canada Labour Code (Part I - Industrial Relations) and, second, that alleged changes in the terms and conditions of employment of the employees of Larose-Paquette Autobus Inc. (Paquette) contravene section 24(4) of the Code.

Specifically, it is alleged that the transfer of Paquette employees to Val Nord Bus Lines Limited constituted an unlawful change in their terms and conditions of employment. The applicants further allege that this transfer constitutes the transfer of part of a business, within the meaning of section 44 of the Code, between these companies and subsequently Sly Shine Inc. Finally, it is alleged that the above-named three companies constitute a single work,

undertaking or business and a single employer within the meaning of section 35 of the Code.

A hearing was held in Montréal on January 23, 25, 26, 30 and 31 and February 1 and 2, 1990. Neither Aqua Lave Inc. (Aqua Lave) nor Sly Shine Inc. (Sly Shine) appeared at this hearing.

II

THE FACTS

Jean-Paul Larose is the principal shareholder in several respondent companies. To all intents and purposes, he wholly owns, either directly or indirectly, and controls these companies. (For the purposes of this hearing, Larose Group or Group will be used interchangeably to identify all of Mr. Larose's companies.) This Group is the product in part of the acquisition and reorganization of transportation companies that initially were unrelated.

The Larose Group

Until the end of October 1989, the Larose Group comprised the following companies which were engaged in the activities described below:

- (a) Larose-Paquette Autobus Inc. (Paquette): inter-provincial charter bus transportation and transporting handicapped persons aboard modified buses (modified transportation) for the Société de Transport de Laval. Occasionally, these buses are chartered to transport handicapped persons interprovincially. Paquette also has contracts with the city of Saint-Eustache and the

C.I.T. (Conseil Intermunicipal de Transport) to serve a number of urban and semiurban routes. These routes are served by city buses.

- (b) Val Nord Bus Lines Limited (Val Nord): school bus transportation for the Commission Scolaire Mille-Iles. Its only employees are drivers.
- (c) Autobus Blainville Inc. (Blainville): school bus transportation. It is not a party to these proceedings.
- (d) Location Trans-Nord Inc. (Location): essentially a holding company. It owns the majority of buses used by the Group. This company is not a party to these proceedings. It has no employees.
- (e) Autobus St-Eustache Inc. (St-Eustache): a management and support company. It manages and directs all companies that make up the Group. It maintains all vehicles used by the Group and, to this end, employs mechanics and maintenance men. Its services are exclusive to the Group. It has the largest number of employees, employing in particular all maintenance personnel and almost all office and management personnel.

Union representation within these companies is as follows:

- (a) Paquette: Initially, the Teamsters were certified under federal jurisdiction to represent a unit of some 35 drivers (13 regular and 22 spare). An application for certification to displace the Teamsters was filed

by the CNTU on April 19, 1989 and allowed by the Board on October 23, 1989.

- (b) Val Nord: Teamsters certified under provincial jurisdiction to represent all drivers who number approximately a dozen.
- (c) Blainville: The CNTU certified provincially to represent all drivers.
- (d) Location: No employees and hence no certification.
- (e) St-Eustache: Teamsters certified provincially to represent all mechanics and maintenance employees. Following a raid, the CNTU displaced the Teamsters in the summer of 1989.

The Reorganization

In the spring of 1989, the CNTU filed with the Board an application for certification to represent all Paquette employees who until then had been represented by the Teamsters. In the summer of 1989, while this application was still pending, the Group began what is described later in this decision as a rationalization of its organization. At the time, Paquette was engaged simultaneously in activities under federation jurisdiction, i.e. inter-provincial charter transportation, and activities specifically under provincial jurisdiction, such as local transportation of the handicapped and urban transportation. The rationalization contemplated by the Group was designed to reorganize its various activities within the province and entrust their administration to companies of the Group engaged solely in these activities. In short, to separate

the federal and provincial sectors and leave Paquette with only the charter operations. The decision was therefore made to transfer intermunicipal transportation and modified transportation from Paquette to Val Nord.

Why decide to rationalize at this particular time? This was a personal initiative on the part of Mr. Larose, who was not called to testify at the hearing. No one provided an explanation, other than to say that Mr. Larose had been talking about it for a long time. A dispatcher testified that this rationalization was a way of keeping the revenues of the various "departments" separate, thus making it easier to see that the operation he headed, modified transportation, was in fact the revenue generating activity that ensured Paquette's survival. Some witnesses testified that the charter business is in decline and may even be running a deficit.

Concurrently with the filing of an application with the Board, the CNTU had also made an initial application for certification to Quebec's Labour Commissioner under the Quebec Labour Code to represent the same group of Paquette drivers. In another application, also made provincially, the CNTU sought and was in fact granted certification to represent the St-Eustache mechanics who until then had been represented by the Teamsters.

Several legal proceedings were instituted at this time. For example, on September 26, Paquette unsuccessfully instituted proceedings in Quebec Superior Court for a stay of the certification proceedings before Quebec's Labour Commissioner. It argued that, in labour relations matters, federal legislation took precedence over provincial legislation and that the Labour Commissioner should suspend his

deliberations until this Board disposed of the proceedings instituted before it. The Court dismissed these applications.

Before the Labour Commissioner rendered a decision on the CNTU's application involving St-Eustache, Paquette applied to the Board for a declaration that Paquette and St-Eustache, its maintenance and operations division, constituted a single employer. In support of this application, these employers argued that the two businesses, which they characterized as federal, were interdependent. Some time later, after the Labour Commissioner had certified the CNTU to represent the St-Eustache employees, the employer withdrew this application. The union, for its part, then instituted proceedings before this Board, alleging this time that Paquette and Val Nord constituted a single employer.

Description of Operations

All vehicles used by the Group are housed in and operated from facilities located on Dubois Street in the town of Saint-Eustache. St-Eustache administers all these businesses. Claire Duthé, head dispatcher, is in charge of the dispatchers who work for the Group's companies. The same is true of the sales department which, although attached to Paquette for administrative purposes, serves all customers and refers them to one or another of the dispatchers assigned to the various companies. Computer operations, like telephone services, are shared by the whole Group. The entire administration is headed by a comptroller who is himself a St-Eustache employee. The dispatchers are all attached to St-Eustache. The boss is Jean-Paul Larose. Although administered at the top, all services provided by St-Eustache are billed to the various companies through an

internal accounting system which prepares financial statements for each company.

Ms. Duthé is responsible for the four collective agreements and for administering them. Vehicle maintenance personnel, unlike the dispatchers, do coach maintenance work for all the companies without distinction and the accounting department does the billing for their services. The relationship between St-Eustache and, for example, Paquette is comparable to that between a supplier and its customer. Like Ms. Duthé and the dispatchers, the garage personnel work for St-Eustache.

Each company has its own drivers who work exclusively for it. Occasionally, the drivers of one company or another may, if they possess the necessary authorities, place their name on the list of spare drivers of the other companies, as they might do with a company wholly independent of the Group. When, in fact, they work for a sister company, they are subject to the terms and conditions of employment of that company and receive a separate salary.

The evidence, including the collective agreements, reveals that the drivers of different categories belong in practice to separate and autonomous groups. The intercity bus drivers hold special authorities that the other two groups do not have. Transporting the handicapped is highly specialized work that is very akin to that of a taxi driver. School bus transportation and urban transportation, or work on urban routes, are also very different and are regulated differently. Moreover, there are specialized vehicles that are exclusive to each category. Certainly, the drivers associate with one another, but when, for example, the Paquette group joined the CNTU, it wanted to be divided into

two groups, one comprising the intercity drivers and the other consisting of the remaining drivers, each believing that it would be better off without the other. A petition to this effect was even signed by the employees. There is no job mobility between the different groups of drivers: each driver is limited to his speciality and "his" company. The drivers have a common terminal, just as Greyhound and Voyageur may also have one.

Paquette occasionally operates charters for the handicapped. In this case, it uses, in return for payment, a modified vehicle owned by Location that is normally used by Val Nord.

The companies that make up the Group have a fleet of some 169 vehicles consisting largely of school buses (110) and modified buses for transporting the handicapped (16). The fleet includes 29 intercity buses. In terms of visual identification, the school buses are painted the usual colour, while the other vehicles bear the Group's distinguishing colours: blue, white and brown.

The Group holds a single insurance policy on the entire fleet of vehicles. Its accounting department assigns to each company its share of the premium.

When Paquette decided, in the summer of 1989, to transfer a number of its activities to its sister company, Val Nord, it was required, under the terms of its contracts with the Société de transport de Laval, the city of Saint-Eustache and the Conseils intermunicipaux des Deux Montagnes et des Basses Laurentides, to obtain their consent to the transfer of these contracts. In fact, each contract was concluded directly between the customer and Paquette. It

sought this consent, through its counsel, in a letter of September 1, 1989.

"As part of the restructuring of the businesses in which Jean-Paul Larose is the principal shareholder, Larose-Paquette Autobus Inc. has sold and transferred the rights under the contract binding it and you to Les Autobus Val Nord Limitée/Val Nord Bus Lines Limited, located at 625 Dubois Street in Saint-Eustache. Jean-Paul Larose is also the sole owner of Les Autobus Val Nord Limitée/Val Nord Bus Lines Limited.

Under the terms of the contract of sale and transfer, this transfer is subject to our obtaining your approval, which we are hereby seeking.

We wish, moreover, to make clear to you that there will be no change in service."

(translation)

The various parties that had contracted with Paquette formally recognized that company's right to transfer their contracts to a new company toward the end of September 1989.

Not until the beginning of November 1989 did management inform Ms. Duthé that the employees had to be transferred. She then advised the accounting department to make the necessary entries in the books because 22 drivers who until then had been employees of Paquette were being transferred to Val Nord. In practice, this change was made retroactively. Although a rumour of this transfer had been circulating, the drivers only learned on November 2, when they received their pay cheques, that they had been working for Val Nord since October 22, 1989. We note that the Board certified CNTU to represent the Paquette employees on October 23 and that Paquette made no request to the Board or to CNTU to make these changes, nor did the employer seek the approval of the Teamsters, which were still the certified bargaining agent on October 22. In fact, Ms. Duthé only notified them after the fact. The Teamsters did not object to admitting these new drivers into their

bargaining unit at Val Nord, as long as they joined the appropriate Teamsters local, in accordance with the relevant collective agreement.

The Dismissal of Alain Mazerolle

Until mid-July 1989, St-Eustache was responsible for the mechanical maintenance, the washing, the oil changing and the refuelling of the various buses of the Group. This work was performed by a day shift and a night shift. The vehicles were normally serviced in the following order: first, Paquette intercity buses, followed by the modified buses for transporting the handicapped, and finally, the school buses. At least this was the procedure followed by the night shift.

On July 18, Ms. Duthé summoned Mr. Mazerolle to her office and, according to contradictory evidence on this point, informed him that because the night shift was dragging its feet and not doing a good job, St-Eustache had decided to entrust this work to a subcontractor. Ms. Duthé told him that he was wasting too much time discussing union matters with Mr. Quérel, a fellow worker identified with CNTU, and that low productivity had forced the company to resort to a subcontractor, Sly Shine, the mis-en-cause. She added, however, that she would tell the subcontractor where it could reach him and it would undoubtedly call him and offer him a job.

In fact, Mr. Mazerolle was contacted, and on August 3 he accepted the job offered by Sly Shine, which was headed by Sylvain Rioux. Mr. Mazerolle performed the same work he had been performing, in the same manner, using the same equipment belonging to St-Eustache, but as part of an

expanded team that worked shorter hours, from 5:00 p.m. until midnight, instead of until 5:00 a.m. the following morning.

However, after working a week, Mr. Mazerolle informed his supervisor that he would be absent the following day because he wished to attend a CNTU union meeting. He was granted leave. The day following the meeting, he was contacted at home and asked to report for work. When he arrived at work, he was told that the contract with Sly Shine had been cancelled and that he was being dismissed. This is what gave rise to his complaint.

In fact, Sly Shine lost its contract to Aqua Lave, another mis-en-cause. At the time, Mr. Mazerolle had worked for Sly Shine for approximately a week or ten days in all. His supervisor, whose name he did not recall, assured him that he would receive his pay by mail. He never received it. No witnesses for Sly Shine appeared before the Board and the evidence did not reveal any link between it and St-Eustache.

Aqua Lave specializes in washing and servicing heavy vehicles for a number of companies. It has been doing this work for a long time. Since taking over the contract from Sly Shine, it has been doing regular nighttime maintenance of vehicles. It is still doing this work today. No witnesses for Aqua Lave appeared at the hearing and no link was established, other than a commercial one, between it and the Group.

The Dismissal of William Quérel

First hired in 1987 as a spare driver by one of the companies of the Group, Mr. Quérel obtained a position with

Paquette as a regular driver on a city route in February 1988. He had applied for this position at the suggestion of Ms. Duthé and Mr. Richard, dispatchers.

As soon as he started work, he joined the raiding campaign organized by CNTU to recruit Paquette drivers. He played an important role in this campaign: he met with almost all the drivers individually; he served as liaison with the CNTU union adviser assigned to the campaign; he participated in the four information meetings held by CNTU; and finally, he obtained signatures on more than 25 membership cards for the new union.

There is general agreement that this was a very open raiding campaign. Everyone at Paquette was aware of it and the drivers talked about it a great deal.

Shortly after filing its application for certification with the Board, the union officially notified the employer of the names of its representatives. Mr. Quérel was among them. At the beginning of May, an initial meeting took place between the employer representatives, Ms. Duthé and Jacques Larose, the owner's son, and the union representatives, including Mr. Quérel. The meeting was cordial. They discussed replacing holidays in the modified transportation sector and also discussed the case of a dismissal.

However, no follow-up meeting took place. After inquiring about her obligations to CNTU, Ms. Duthé announced that she was suspending any further meetings until the Board disposed of the certification proceeding. She was obliged, she said, to deal only with the Teamsters, which was still the certified bargaining agent.

During the summer and fall of 1989, however, Mr. Quérel was allowed time off work on several occasions to participate in activities organized by CNTU.

On November 2, Mr. Quérel learned from his dispatcher, Mr. Décary, that operation of the city routes of Paquette had been transferred to Val Nord. Mr. Décary also advised him that, under the collective agreement in force at Val Nord, he had to sign a Teamsters membership card in order to work there. The discussion became heated and Mr. Quérel flatly refused to join the Teamsters. A meeting was subsequently held which was attended by Ms. Duthé, Mr. Décary, Mr. Quérel and Mr. Geoffrey, a Paquette driver who attended at Mr. Quérel's request.

Mr. Quérel persisted in his refusal. Ms. Duthé then informed him that he was being dismissed, making clear that it was from Val Nord. His dismissal was confirmed in writing on November 7, 1989. Ms. Duthé testified that she did not dismiss Mr. Quérel at the request of the Teamsters. She acted on her own initiative.

In the past, this article of the Teamsters collective agreement does not appear to have been applied in this manner, but the facts in this regard are unclear.

Since his dismissal, Mr. Quérel's name has remained on the list of spare drivers at Paquette. He had been recalled to work at least once.

In January 1990, at his request, he obtained, this time from Paquette, a separation certificate for unemployment insurance.

III

THE ARGUMENTS

Some of the companies belonging to the Group challenge first the Board's constitutional jurisdiction over them.

Of all these companies, argued counsel for the Group, only Paquette (provincial and interprovincial transportation) carries on activities that come clearly under federal jurisdiction. Counsel acknowledged, however, that St-Eustache (management and administration of the businesses and vehicle maintenance) carries on in part activities that are vital to the operation of Paquette. St-Eustache was therefore also, at least in part, a federal work, undertaking or business according to the decision in Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115 (Northern Telecom No. 1). In the case of these respondents, argued counsel, the Board could certify CNTU to represent the St-Eustache mechanics, who were currently certified provincially. However, this certification would apply only to the federal part of the activities of St-Eustache.

Counsel for the respondents further argued that Val Nord (school bus transportation) and Location (owner of the vehicles) are strictly local and provincial undertakings and are therefore wholly outside the Board's jurisdiction. The Board could not therefore either declare, pursuant to section 44 of the Code, that there had been a transfer of rights between Paquette and Val Nord or rescind this transfer. Nor could it rescind Paquette's decisions concerning this transfer, including the decision to dismiss Mr. Quérel.

On the merits, the respondents argued that the transfer of activities from Paquette to Val Nord is justified for management purposes and has nothing to do with an unfair labour practice.

The applicant union, for its part, also argued that Paquette and that part of the activities of St-Eustache that are related to the operation of Paquette, are federal works, undertakings or businesses. Moreover, their functional and administrative integration made them a single work, undertaking or business within the meaning of section 35 of the Code. The union argued that two bargaining units, one provincial and the other federal, each representing a different group of mechanics, can co-exist at St-Eustache. With regard to the complaints, the Board's undisputed jurisdiction over Paquette was, in the union's opinion, sufficient grounds to rescind the transfer between Paquette and Val Nord. This transfer contravened the freeze on terms and conditions of employment imposed by section 24(4) of the Code and this action could in no way be termed business as before, as this expression was defined in the case law on this subject. Moreover, this transfer was used to manipulate the employees and force them to renounce the union they had just chosen. In rescinding the transfer, the Board would merely be restoring the integrity of the bargaining unit that had been shattered by the employer's unfair labour practice.

On the matter of the dismissals of Messrs. Quérel and Mazerolle, the union argued that they too should be rescinded because they were motivated by anti-union animus. A trap was set for Mr. Quérel: Paquette knew very well that

he would not agree to sign a Teamsters membership card when he had been one of CNTU's most committed organizers.

As for Mr. Mazerolle, he was not really dismissed by Sly Shine. This company was merely an agent of Paquette and St-Eustache that was used to further fragment their activities, thereby weakening the bargaining units. In any case, Sly Shine, which provided Paquette with essential vehicle maintenance services, was just one more of the companies making up the Group. The Board, moreover, should recognize that it was part of the single undertaking which, in counsel's opinion, comprised Paquette and St-Eustache.

Counsel for the Teamsters confined her arguments to the question of the Board's constitutional jurisdiction.

She argued that the companies making up the Group operate separately using the revenues they generate and are therefore autonomous and independent businesses. Of these businesses, only Paquette came under federal jurisdiction. Although St-Eustache provided Paquette with services that could be termed vital to its federal operations, these services represented only a tiny part of all St-Eustache activities. It provided the same type of services to the other businesses making up the Group, and these businesses came clearly under provincial jurisdiction. Moreover, St-Eustache managed all businesses in the Group. Those St-Eustache activities vital to Paquette's operation did not constitute a large enough percentage of its activities as a whole to make it a federal work, undertaking or business. For these reasons, the Board's jurisdiction would be limited to Paquette, and only Paquette as it was now constituted, after all its bus transportation activities, save its charter operations, were severed from it.

IV

THE DECISION ON THE CONSTITUTIONAL ISSUE

Section 4 of the Code stipulates the following:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Moreover, section 2 defines the expression "federal work, undertaking or business" as follows:

"2. 'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with another province, or extending beyond the limits of a province, ..."

(In this regard, see Agence Maritime Inc. v. Conseil canadien des relations ouvrières et al., [1969] S.C.R. 851; and (1969), 12 D.L.R. (3d) 722.)

Contrary to what counsel for the Group argued at one point (page 6), legislative primacy in labour relations matters rests with the provincial legislatures (Toronto Electric Com'rs v. Snider et al., [1925] 2 D.L.R. 5; [1925] A.C. 396; and [1925] 1 W.W.R. 785 (P.C.)). However, certain matters are within the legislative authority of the Parliament of Canada. In these exceptional cases, the labour relations that are an integral part of the operation of businesses under federal jurisdiction will themselves come under federal jurisdiction. This, in short, is the reason for the

Code and the Board (regarding the validity of the Industrial Relations and Disputes Investigation Act (Canada), see Validity and Applicability of the Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529; and [1955] 3 D.L.R. 721; Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] 59 D.L.R. (2d) 145 (S.C.C.)).

The nature of a business will ultimately determine where constitutional jurisdiction over labour relations that are an integral part of the business lies (Canada Labour Relations Board et al. v. City of Yellowknife, [1977] 2 S.C.R. 729; and (1977), 77 CLLC 14,073).

In order to determine the nature of an operation, one must look at its normal activities as a going concern (Commission du salaire minimum v. Bell Telephone Co. of Canada, supra; Construction Montcalm Inc. v. The Minimum Wage Commission et al., [1979] 1 S.C.R. 754; Northern Telecom No. 1, supra. Conversely, regard must not be had to casual or exceptional factors that may mark the existence of a business (Agence Maritime Inc. v. Conseil canadien des relations ouvrières et al., supra)).

Finally, since federal jurisdiction is the exception, the burden of proof rests with the party that makes the claim (Maska Manpower Inc. (1984), 57 di 193 (CLRB no. 487)).

The first issue the Board must decide in the instant case is the number of businesses that make up the Group, if in fact it comprises more than one. As the arguments reveal, the parties disagree markedly on this question. They all agree that there is more than one business and also on the fact that they do not all come under the same constitutional jurisdiction. Moreover, they all admit that Paquette, when

viewed in isolation, is a business and that it is under federal jurisdiction. As for the remainder of the businesses, the parties are divided.

Before we can characterize a business as federal or provincial, we must first, as it were, identify the business. This process must not be confused with the process of determining whether a provincial undertaking is incidental or vital to the operation of a core federal undertaking (Byers Transport Limited et al. (1986), 65 di 127; and 12 CLRBR (NS) 236 (CLRB no. 571)).

The concepts of federal business, undertaking or work are not really clearly defined, and some have questioned how they should be differentiated. (See G. Adams, Canadian Labour Law (Aurora: Canada Law Book, 1985), page 118 et seq.; Claude H. Foisy et al., Canada Labour Relations Board Policies and Procedures (Toronto: Butterworths, 1986), page 2 et seq.; Central Western Railway Corporation v. United Transportation Union et al., [1989] 2 F.C. 186; (1989), 47 D.L.R. (4th) 161; and 84 N.R. 321.)

Rather than being defined, the concept of "business" is more often illustrated in constitutional case law by examples. (See in this regard the judgment in Canada Labour Relations Board et al. v. City of Yellowknife, supra.)

The Board, however, like many of the courts and its provincial counterparts, must apply the sale of business provisions of the Code (Agence Maritime Inc. v. Conseil canadien des relations ouvrières et al., supra; Syndicat national des employés de la Commission scolaire régionale de l'Outaouais v. Union des employés de service, Local 298 (FTQ), and Réal Bibeault, [1988] 2 S.C.R. 1048 (Bibeault),

page 1103). In doing so, one concept it must define is that of business. Although we sometimes forget, section 44(1) of the Code begins with the following definition:

"'business' means any federal work, undertaking or business and any part thereof."

(emphasis added)

Thus, any business that could be subject to a sale within the meaning of sections 44 and 45 must also be termed a federal business according to the definition given in section 2. Logically, and without regard to any subsequent constitutional qualification, a business within the meaning of section 44 of the Code must also be a business within the meaning of section 2.

Consequently, the case law dealing with section 44 should clarify the concept of business within the meaning of section 2 because one refers to the other and both refer to the same concept of going concern. In fact, the concept adopted by a plenary session of the Board for the purposes of applying section 44 is that a business must be viewed as a going concern (Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402)). In Northern Telecom No. 1, supra, at page 132, the Supreme Court specifically stated that from a constitutional standpoint, a business must also be viewed in its entirety as a going concern. Moreover, both constitutional case law and that dealing with a sale of business reveal that a business is characterized by the presence of certain elements essential to the operation of a viable economic vehicle, without regard to the specifics of the corporate or contractual framework within which they exist (Northern Telecom No. 1, supra; Construction Montcalm, supra; Terminus Maritime Inc., supra).

In Bibeault, supra, Beetz J., speaking for the Court, examined the concept of undertaking as it applies to a sale of business under the Quebec Labour Code. He had this to say:

"... the undertaking covers all the means available to an employer to attain his objective. I adopt the definition of an undertaking proposed by Judge Lesage in a subsequent case, Mode Amazone v. Comité conjoint de Montréal de l'Union internationale des ouvriers du vêtement pour dames, [1983] T.T. 227, at p. 231:

[TRANSLATION] 'The undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities. These resources may, according to the circumstances, be limited to legal, technical, physical, or abstract elements. Most often, particularly where there is no operation of the undertaking by a subcontractor, the undertaking may be said to be constituted when, because a sufficient number of those components that permit the specific activities to be conducted or carried out are present, one can conclude that the very foundations of the undertaking exist: in other words, when the undertaking may be described as a going concern. ...'"

(page 1105; emphasis added)

As we saw earlier, the concept of going concern is also the concept that the Court applies in defining the constitutional status of a business. Logically, we should be guided by this definition in deciding how many "going concerns" the Group comprises from a constitutional standpoint.

The companies that make up the Group are engaged in road passenger transportation. This is their market niche, the reason for their existence. Roughly speaking, they operate in three market segments: intercity transportation (charters), modified transportation, and school bus transportation.

A close examination of the companies that belong to the Group reveals that they clearly are interrelated, but also that they are relatively autonomous.

St-Eustache manages the various companies. To all intents and purposes, it manages all support activities. It deals with suppliers, hires and manages personnel for the various companies, negotiates collective agreements, buys insurance, manages authorities, provides for vehicle maintenance and refuelling, sends out invoices, collects receipts, pays employees, deals with the banks, etc. However, it is not a holding company, but rather a service firm. Moreover, each company in the Group has a separate corporate identity and purchases services from its sister companies. St-Eustache performs administrative tasks that are often performed by service enterprises serving small business.

For a long time, the only Paquette employees have been drivers. The company leases or owns intercity buses and operates under interprovincial charter transportation authorities. On rare occasions, it borrows from Val Nord a modified bus for transporting handicapped customers. This, in our opinion, is what the Supreme Court calls an exceptional activity. Paquette drivers are the only drivers in the Group who must hold authorities to operate intercity buses, and they are not called upon to work for the other companies. This operation has its own corporate identity and a separate, if not exclusive, administration. Paquette has directly entered into contracts that cannot be transferred to sister companies without the approval of its customers. It has been certified federally since 1985 (file 555-2300) and has its own collective agreement. One of its sister companies maintains the vehicles belonging to the Group. Paquette is the smallest company and also the only

one engaged in interprovincial transportation. Assuming that all its vehicles were in working condition, which they are not, Paquette's intercity buses account for barely 17% of the Group's entire fleet.

In terms of autonomy, Val Nord and Blainville are, with a few exceptions, in the same operating situation as Paquette. They are engaged primarily in school bus transportation and each is responsible for the exclusive performance of a contract entered into with a school board. They are engaged only in local transportation. Each is a separate legal entity and represents itself as such to its customers. Each has a dispatcher and employs drivers who work for it exclusively. There is no job mobility between these companies. Each holds a separate provincial certification and has a separate collective agreement. This also applies, mutatis mutandis, to persons employed in modified transportation or urban transportation.

As Chief Justice Dickson stated in Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications, [1989] 2 S.C.R. 225 (see page 298), in constitutional matters, there is no universal rule: each case rests on the facts that are specific to it. In the light of this principle, how many businesses, or going concerns, make up the group that we have described? Excluding Blainville which did not appear at the hearing, we conclude, with some hesitation, that there are four: Paquette, St-Eustache, Val Nord and Location.

The Privy Council, in Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657 (Winner), shed some light on the method of determining whether an undertaking

is federal where a bus transportation company operates both provincial and interprovincial routes:

"... The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether: it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the Province, or are there two?

...

No doubt the taking up and setting down of passengers journeying wholly within the Province could be severed from the rest of Mr. Winner's undertaking but so to treat the question is not to ask is there an undertaking and does it form a connection with other countries or other Provinces but can you emasculate the actual undertaking and yet leave it the same undertaking or so divide it that part of it can be regarded as interprovincial and the other part as provincial.

The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the Province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking."

(pages 679-680; emphasis added)

We do not believe that the Privy Council intended that sister companies engaged in similar but separate sectors of activity could never be divided for constitutional purposes between federal and provincial jurisdictions. What the Privy Council said was that this exercise could not be conducted in the abstract, by emasculating the real business or dividing it artificially. After all, the Privy Council relied on the evidence in making the following finding in Winner: "The undertaking in question is in fact one and indivisible."

Similarly, when, in Alberta Government Telephones, supra, Chief Justice Dickson set out the law that applies in cases governed by section 92(10)(a) of the Constitutional Act of

1867, he was careful to point out that the parties had not argued that Alberta Government Telephones was divisible (Alberta Government Telephones, *supra*, page 257). Moreover, the evidence related in this judgment reveals a single and integrated operation. This tends to illustrate that operational integration necessarily weighs in the final decision. At the very least, it can be said that this judgment did not decide the question of whether sister companies can be divided because it did not ask the question.

"(b) Analysis: Is AGT a s. 92(10)(a) Work or Undertaking?

Let me say at the outset that none of the parties or interveners in this appeal advocated a divided jurisdiction, with the province regulating the intraprovincial or local aspects of the operations of AGT and Parliament regulating the interprovincial and international aspects. It is an all or nothing affair.

The case law clearly establishes that if a work or undertaking falls within s. 92(10)(a) it is removed from the jurisdiction of the provinces and exclusive jurisdiction lies with the federal Parliament (City of Montreal v. Montreal Street Railway, [1912] A.C. 333 (P.C.) (hereinafter Montreal Street Railway), at p. 342; Attorney-General for Ontario v. Winner, [1954] A.C. 541 (P.C.) (hereinafter Winner), at p. 568)."

*(Alberta Government Telephones, *supra*, pages 256-257; emphasis added)*

To repeat the rule once more, one must examine the facts of the situation. If, leaving aside the corporate structures, one finds a single indivisible operation whose activities are integrated, it cannot be divided artificially so as to allow a part of it not to come under federal jurisdiction. However, it does not appear to us that the case law is asking us to turn a blind eye to clear and precise divisions between certain related operations and lump them all together under federal jurisdiction without first ensuring that each really is a federal undertaking (Northern Telecom Canada Limited et al. v. Communication Workers of Canada et

al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC 14,048 (Northern Telecom No. 2)).

Is the situation of the Group similar to that described in Winner, supra? No, except insofar as it too is engaged in bus transportation. Are all companies that make up the Group a single, integrated and indivisible undertaking, carrying on a regular federal activity - that of Paquette - thereby bringing them all under federal jurisdiction? (See Ottawa-Carleton Regional Transit Commission (1983), 51 di 173; and 83 CLLC 16,016 (CLRB no. 406) (OC Transpo), upheld by the Ontario Court of Appeal in Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279, et al. (1983), 44 O.R. (2d) 560; 4 D.L.R. (4th) 452; and 84 CLLC 14,006. See also Ferguson Bus Lines Ltd. v. ATU, Loc. 1374 (1990), 68 D.L.R. (4th) 699 (F.C.A.).) We do not believe so.

Paquette's present situation is totally different from that described in Winner or Alberta Government Telephones, supra. Generally speaking, what characterizes the companies belonging to the Group is clearly their transportation activities. These activities are varied and subdivide naturally into different specialized sectors that are distinct and different from one another and clearly autonomous in relation to each other. Finally, each sector constitutes in the instant case a corporate entity that is not merely an empty shell.

For example, charter transportation is exclusive to Paquette. This operation not only is divisible from the others, but also is in fact separated from them. For a certain period, it is true, Paquette was also engaged in modified transportation and municipal transportation. At

the time, Paquette was larger, and it was in this broader context that the Board initially certified the Teamsters, and then CNTU, to represent its employees. This is no longer the case (Byers Transport Ltd. et al., supra).

Counsel for the Teamsters suggested that even under their 1985 certification, Paquette was not wholly under federal jurisdiction. Besides now being academic, this argument is not supported by the evidence. On the contrary, the evidence shows that prior to the summer of 1989, Paquette was engaged in diversified local and interprovincial transportation, and that these two activities were integrated and undivided. Certainly, they could have been divided, because they subsequently were. However, based on the situation that existed at the time, as this principle is enunciated in Winner and OC Transpo, supra, this sector was wholly within federal jurisdiction because its diverse activities, some of which were purely local, were operated jointly within Paquette until the summer of 1989 (Music Man Leasing Ltd., Bus Drivers (London) Inc. (1982), 51 di 51; and [1982] 2 Can LRBR 37 (CLRB no. 381)). However, the opposite is now true.

The Group, as stated earlier, comprises a number of companies engaged in transportation. However, for the purposes of determining its constitutional status, this group subdivides naturally into various sectors. The activities of Paquette within the Group form a distinct, divisible and separate entity, as a going concern. The following example will clarify this point. If the owner of the Group were to sell his charter transportation operation, i.e. Paquette, as we described it, to another transportation undertaking, it could certainly be said that what is sold constitutes a business, a going concern, within the meaning

of section 44. Paquette, with its drivers, its assets, its corporate name and its clientele, clearly consists in "an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities" (see Bibeault, at page 22 of these reasons). Thus, Paquette constitutes in the instant case a going concern. At the same time, the purchaser would come within federal jurisdiction because he would have just purchased a federal work, undertaking or business within the meaning of section 2, namely, a going concern, subject to the legislative authority of Parliament. Depending on whether or not the purchaser's way of operating Paquette integrated it into his other activities, these activities would come under federal jurisdiction either wholly (Winner, OC Transpo, Alberta Government Telephones, supra; Highway Truck Service Ltd. (1984), 57 di 178 (CLRBR no. 486), affirmed by the Federal Court of Appeal, no. A-1426-84), or in part (CPR v. A.G. BC et al., [1950] A.C. 122; and [1950] 1 W.W.R. 220 (P.C.) (Empress Hotel); Northern Telecom No. 2, supra; Canada Post Corporation and Shoppers Drug Mart Limited (1987), 71 di 103; 1 CLRBR (2d) 218; and 87 CLLC 16,049 (CLRBR no. 649), affirmed by the Federal Court of Appeal in a judgment rendered from the bench, no. A-762-87, January 28, 1988; appeal to the Supreme Court dismissed on May 27, 1988).

The evidence persuades us that the various components and sectors that make up the Group are sufficiently distinct so as not to be confused constitutionally. The companies that make up the Group are in fact divisible constitutionally because they correspond to separate "sectors of activity," within the meaning of section 2 of the Code, under either federal or provincial jurisdiction. Above all, these sectors each constitute a business, a going concern, for the purposes of determining their constitutional status.

Blainville and Val Nord, as they are now constituted, are under provincial jurisdiction. They are not engaged, either directly or indirectly, in any activity that is under federal jurisdiction and their operation is distinct and separate from that of Paquette. There is no operational link between these businesses and Paquette. There is not even any co-ordination of activities with Paquette because, like it, they operate independently. All they have in common is their owner and certain managers (Byers Transport Limited et al., supra). To attempt to view them as an integrated whole would in fact be to emasculate them.

What of St-Eustache? From all appearances, it also meets the definition of a going concern. St-Eustache is also a separate business for constitutional purposes. Unlike Paquette, St-Eustache does not engage in any transportation activities and is, by definition, under provincial jurisdiction. Could a subordinate or incidental undertaking come within our constitutional jurisdiction because its activities are necessarily complementary?

In Marathon Realty Company Limited (1977), 25 di 387; [1978] 1 Can LRBR 493; and 78 CLLC 16,138 (CLRB no. 117), the Board adopted a rule for determining whether or not a subordinate undertaking is under federal jurisdiction. This was in 1977. Subsequently, the Supreme Court of Canada rendered judgments in Construction Montcalm, Northern Telecom No. 1 and Northern Telecom No. 2, supra. As the authors pointed out (see Foisy et al., supra), regardless of how the issue is stated, the courts have always had to answer certain questions to determine under which constitutional jurisdiction a subordinate undertaking falls. The Board asked

the following three questions in Marathon Realty Company Limited:

- A. Is there a federal work, undertaking or business involved in the case?
- B. If so, is there work being performed by employees upon or in connection with the operation of the federal work, undertaking or business?
- C. If so, can that work be characterized as being a major or significant part of their total work output?

It can be said that an undertaking that is incidental to a federal undertaking is itself federal if the answer to these three questions is yes. The answer to the first question is quite apparent given the presence of Paquette. We now turn to the second question: considering the work that is performed by the managers and mechanics of St-Eustache, is this work done upon or in connection with the actual operation of Paquette? The answer to this question is less apparent, but let us assume that it is yes. However, one fact remains, and that is our answer to question three: the work done by these persons represents perhaps 17% of all St-Eustache activities, and it does not therefore constitute the essential or major component of their work.

Counsel for CNTU argued that we should fragment St-Eustache, suggesting, for example, that the mechanics who service the intercity buses operated by Paquette are under federal jurisdiction, but not the rest of the mechanics, even though they all work under one roof. This artificial division of St-Eustache would be contrary to the law (Winner and Construction Montcalm, supra) and would, moreover, create

a nightmare for the parties: two Codes, two statutes on minimum standards, on safety and health, etc., within the same business. The work of a mechanic must be considered in its entirety and viewed as a whole. This is in fact the reality of the situation. This work is not an integral part of the operation of Paquette, even if it is necessary (Wardair Canada (1975) Ltd. (1978), 32 di 248; and [1979] 1 Can LRBR 49 (CLRB no. 155), affirmed by the Federal Court of Appeal in Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd. et al., [1979] 2 F.C. 91; (1979), 97 D.L.R. (3d) 38; and 25 N.R. 613). The question is not whether Paquette needs the services of mechanics and whether these services are vital to it. This goes without saying. Rather the question is whether the provision of these services by St-Eustache to Paquette is so characteristic of the activities of St-Eustache that it constitutes the essential element of these activities. Paquette is the smallest sector of the Group and is therefore just one of a number of minority activities and one of a number of users of St-Eustache services. Without Paquette, St-Eustache would continue to operate. In this sense, serving Paquette is not crucial to St-Eustache. In other words, the work that the mechanics do for Paquette does not represent the essential or major part of the work they perform as St-Eustache employees (Marathon Realty Company Limited, supra). Therefore, St-Eustache does not come under federal jurisdiction.

In summary, the Board assumes jurisdiction over the part of the Group concerned with interprovincial transportation and known as Larose-Paquette Autobus Inc. It does not assume jurisdiction over all other sectors.

Similarly, since no evidence produced would enable the Board to take jurisdiction over Sly Shine Inc. and Aqua Lave Inc., the Board does not assume jurisdiction over them as federal works, undertakings or businesses.

V

THE DECISION ON THE APPLICATION FOR A DECLARATION OF
SALE OF BUSINESS AND ON THE APPLICATION FOR A
DECLARATION OF SINGLE EMPLOYER

CNTU is asking the Board to declare that Val Nord and Sly Shine are the successors of Paquette through the application of section 44 and that Paquette and St-Eustache are a single employer within the meaning of section 35. The employer subscribes in part to the latter conclusion.

These provisions read as follows:

"44.(1) In this section and sections 45 and 46,

'business' means any federal work, undertaking or business and any part thereof;

'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsection 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; ..."

* * * *

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more

employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

(emphasis added)

In the instant case, there undoubtedly was a sale or transfer of part of a business between Paquette and Val Nord and the employees affected were protected by the Code when the transaction took place. There is no doubt that what was sold clearly constituted part of a business. However, as we explained earlier in these reasons (page 28), the activities transferred by Paquette were purely provincial in nature. They were federal only in that they were integrated into the interprovincial activities of Paquette. This ceased to be the case following their transfer to Val Nord, none of whose activities were under federal jurisdiction. Once transferred to Val Nord, this part of a business did not cease to be a business, but ceased to be a federal work, undertaking or business (Byers Transport Limited et al., supra).

In the case of section 44, the Board must have jurisdiction over the purchaser and, in the case of section 35, over a plurality of "federal works, undertakings or businesses." For the reasons stated earlier, the Board has jurisdiction only over Paquette and not over Val Nord. This suffices to oblige the Board to dismiss all applications based on these provisions.

Until the various legislative jurisdictions in Canada adopt measures to remedy the negative consequences for workers of such interjurisdictional transactions, tribunals like this

Board will remain powerless to deal with cases like this one, even though the facts are very clear.

VI

THE DECISION ON THE COLLECTIVE TRANSFER OF PAQUETTE
EMPLOYEES TO VAL NORD (ss. 24(4) and 94(3)(a)(ii))

CNTU argued first that the collective transfer from Paquette to Val Nord of the drivers employed in modified transportation contravenes section 24(4) of the Code, which reads in part as follows:

"24.(4) Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until

...

(b) thirty days have elapsed after the day on which the Board certifies the trade union as bargaining agent for the unit, ..."

In examining this transfer closely, we note that it consisted of two steps: termination of employment with Paquette and hiring by Val Nord. One driver, Mr. Quérel, received two notices of dismissal.

This transfer "officially" took place the day before CNTU's certification, and hence while the Teamsters were still certified. In fact, it occurred on November 2, with effect retroactive to October 22. Regardless of when it took place, this transfer was subject to the provisions of section 24(4).

Commenting on the purpose of section 24(4), the Board said the following in Canadian Imperial Bank of Commerce (Creston and St. Catharines) (1979), 35 di 105; [1980] 1 Can LRBR 307; and 80 CLLC 16,002 (CLRB no. 202):

"A new role is created for the Board. Except in the circumstances where there is an existing collective agreement where terms and conditions of employment are clearly delineated, it becomes the responsibility of the Board to ensure that nothing is done which may affect the employees' right of selection. ..."

(pages 125; 322; and 367; emphasis added)

In fact, section 24(4) is much more concerned with protecting non-unionized employees involved in an organizing campaign than with protecting employees already organized who enjoy the protection of a collective agreement.

When they were laid off collectively, the drivers employed by Paquette were governed by a collective agreement negotiated by the Teamsters. Although the agreement had expired, it remained in force because no party had acquired the right to declare a strike or lockout. (For a case involving the application of section 50, see Air Canada (1988), 72 di 169; and 88 CLLC 16,010 (CLRB no. 669).) However, CNTU did not grieve this collective lay-off even though section 36 of the Code had substituted CNTU for the Teamsters as party to their collective agreement. The relevant provisions of section 36 read as follows:

"36.(1) Where a trade union is certified as the bargaining agent for a bargaining unit,

...

(b) the certification of any trade union that was previously certified as the bargaining agent for any employees in the bargaining unit is deemed to be revoked to the extent that the certification relates to those employees; and

(c) the trade union so certified is substituted as a party to any collective agreement that affects any employees in the bargaining unit,..."

(emphasis added)

Moreover, the collective agreement in question contains the following provisions:

"BARGAINING UNIT

2.1 The company recognizes the union as the sole bargaining agent for its employees covered by the certification certificate issued to the union.

...

LAY-OFF AND RECALL TO WORK

11.2 In the event of a reduction of personnel in a department, provided an employee who remains at work is qualified immediately to perform the work to be done and meets the requirements of the home base concerned, employees will be laid off in the following order:

...

SEPARATION PAYMENT AND TERMINATION OF EMPLOYMENT

12.1 The company will pay an employee whose employment is terminated all pay that is owed him and for all holidays that he has acquired as soon as possible, but not later than ten (10) working days after the termination of his employment.

...

DURATION AND SIGNING OF THE COLLECTIVE AGREEMENT

35.2 This collective agreement continues in force despite its expiry date until a new collective agreement is signed or, as the case may be, until the date on which the right to declare a strike or lockout is acquired during negotiations for renewal of the agreement."

(translation)

Section 24 of the Code prohibits altering terms and conditions of employment, not altering a person's employment status (Québecair (1985), 60 di 119; and 86 CLLC 16,001 (CLRB no. 505)). The "business as before" rule must be applied (Bank of Nova Scotia (Sherbrooke and Rock Forest) (1982), 42 di 398; [1982] 2 Can LRBR 21; and 82 CLLC 16,158 (CLRB no. 367)). It seems clear that the relevant

collective agreement covered termination of employment and that the employer would not have altered the terms and conditions of employment by applying this agreement. Nor would it have altered them had it granted a pay increase provided for in the agreement. Moreover, the evidence reveals that the drivers supposedly transferred are still working under the same terms and conditions.

Did the collective lay-off or transfer contravene the collective agreement? An arbitrator could have decided this matter. Even if one concluded that, in principle, this change contravened section 24 of the Code, given the union's failure to contest this action through a grievance, we cannot find in the instant case that the employer's decision was not made "pursuant to a collective agreement" within the meaning of section 24(4). Moreover, the union did not even allege that the employer's action contravened this agreement or that it was not governed by it. This leaves us little choice but to conclude that this allegation is ill-founded.

This finding obviously poses a problem regarding the fate of the drivers "transferred" from Paquette to Val Nord. The Board has serious reservations about the action taken by Paquette, given its timing, the circumstances and our finding that section 44 does not apply in the instant case.

The transfer of the drivers employed in modified transportation from Paquette to Val Nord has already been described as a collective termination of employment by Paquette.

The complaint filed on behalf of the group of drivers employed by Paquette strongly suggests that this action was motivated by anti-union animus, but nowhere does this

complaint allege that this transfer contravened section 94(3)(a)(i). This prohibition could not be any clearer:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."

(emphasis added)

Certainly, counsel for the complainants explained at the end of the hearing the reference to section 94 that appears in one of the conclusions of the complaint. However, the complainants never related the so-called collective transfers to the latter provision. Without being overly formal, and admitting at the same time that the union may have been confused by the employer's constitutional musical chairs, we do not believe that we have the power, in the instant case, to amend on our own authority a proceeding when the parties to the present proceedings are represented. It is not enough to refer to a series of sections of the Code to meet the requirements of section 35 of the Regulations. Since the Board does not believe that it has before it a valid complaint in this regard, out of concern for procedural fairness, particularly where the burden of proof is automatically reversed and is assumed by the respondent, it has no choice but to dismiss the complaint contesting this collective transfer of the drivers.

VII

THE DECISION CONCERNING THE COMPLAINTS OF DISMISSAL

(a) Mr. Mazerolle (745-3346)

The events that led to Mr. Mazerolle's dismissal (see page 11 et seq.) reveal first that in mid-July 1989, he was laid off by St-Eustache. No complaint in this regard was made against St-Eustache nor was any grievance filed.

Hired by Sly Shine at the beginning of August, he was laid off a few days later. This time, a complaint against Sly Shine was filed with the Board. The complainant did not cite any witness from Sly Shine. We have already held that Sly Shine is not within our jurisdiction.

The evidence did not show the slightest connection between Sly Shine and St-Eustache or Paquette that could have led us to conclude that Sly Shine was in any way an agent of St-Eustache and Paquette. For these reasons, the complaint is dismissed.

(b) Mr. Quérel (745-3425)

The events that led to Mr. Quérel's dismissal were related in detail earlier in these reasons (see page 12 et seq.). He made a complaint under section 97 alleging a contravention of section 94(3)(a) of the Code.

In this type of complaint, the burden of proof rests with the employer:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection

94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

Mr. Quérel is one of the Paquette drivers "transferred" to Val Nord.

The respondent submits that when Mr. Quérel refused to sign the Teamsters membership card that Ms. Duthé presented to him on behalf of Val Nord, he was dismissed "by Val Nord." The relevant question concerns events prior to this refusal: why did he have to sign this card? The reason, it was said, was because he had been "transferred" from Paquette to Val Nord and because membership in the Teamsters at Val Nord was compulsory under the collective agreement.

The only employer over which we have jurisdiction is Paquette, against which the complaint was filed. It was in the course of rationalizing jurisdictions that the decision was apparently made to make the collective transfer and hence to transfer Mr. Quérel. Ms. Duthé learned of the transfer from the employer and carried it out. No explanation was given for this action and its suddenness. The explanation given by Paquette as to how the employer changed from one jurisdiction to another and from one constitutional position to another is not very convincing. CNTU's filing of the application for certification appears to us, on the contrary, to have directly influenced this sudden need to rationalize the sectors of activity. The fact that this rationalization was carried out retroactively, on the eve of the certification, was in no way explained and, on the contrary, tends to strengthen our belief that the Code was contravened. Moreover, the summary way, to say the least, that Mr. Quérel was treated does not

indicate an absence of anti-union animus. The employer had to have known that in presenting him with a *fait accompli*, and waving a Teamsters membership card in his face, he would react as he did. It thus became a very simple matter to dismiss him, apparently from Val Nord, because, it was said, of his refusal to join the Teamsters!

Counsel for the employer gave into the temptation to argue that it was Val Nord, and not Paquette, that dismissed him. The Board cannot accept this explanation. According to the employer's own version of events, Paquette dismissed the complainant and Val Nord refused to hire him. The dismissal by Paquette suffices to allow the complaint, regardless of what Val Nord may have said subsequently.

Based on the evidence, the Board concludes that this so-called transfer of Mr. Quérel by Paquette was unlawful and constituted a disguised dismissal. What may have happened at Val Nord merely strengthens our belief that in terminating Mr. Quérel's employment and in transferring him to Val Nord, Paquette was guilty of anti-union animus.

VIII

THE REMEDIES

Based on the evidence, the only proceeding that is allowed is the one instituted by Mr. Quérel. Section 99 stipulates the following:

"99. Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with [section 94], the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(c) in respect of a failure to comply with paragraph 94(3)(a), ... by order, require an employer to

(i) employ, continue to employ or permit to return to the duties of his employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ, has suspended, transferred, laid off or otherwise discriminated against, or discharged for a reason that is prohibited by one of those paragraphs,

(ii) pay to any employee or other person affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to that employee or other person, ..."

The Board therefore declares unlawful and rescinds Mr. Quérel's dismissal.

The Board is aware that the group of drivers to which Mr. Quérel belongs is now employed by Val Nord, against which no conclusions can be reached.

However, the Board can and hereby does order that Paquette reinstate immediately Mr. Quérel in the same position he occupied on October 22, 1989 and that it compensate him in accordance with section 99, as if he had never been dismissed, the whole subject to what follows.

Should Mr. Quérel's reinstatement require that contracts transferred from Paquette to Val Nord be returned to Paquette, the Board orders Paquette to proceed with this action to the extent necessary to preserve Mr. Quérel's position.

Mr. Quérel, of course, could also work for Val Nord. Consequently, if, within 10 days of this decision, Val Nord voluntarily offered Mr. Quérel a position and were he to be fully compensated by Paquette in accordance with the present

remedies, if Mr. Quérel accepted Val Nord's offer in writing, Paquette would then be relieved of its obligation to reinstate him.

The Board retains jurisdiction should any problem arise in implementing the present remedies. Moreover, it appoints René Lacas, senior labour relations officer with our Quebec regional office, to assist the parties in applying the present remedies.

Finally, the Board reserves the right to issue a formal order and to take any further remedial action as a result of the unfair labour practice committed against Mr. Quérel.

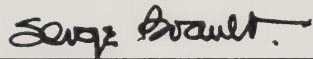
IX

THE REQUEST TO REOPEN THE HEARING

On April 6, 1990, the Board received from counsel for Paquette a request to reopen the hearing. In this request, counsel states in a few lines that he wishes to argue that section 98(4) of the Code is unconstitutional because it contravenes section 15 of the Charter of Rights and Freedoms. He does not go on to say why it contravenes the Charter and does not specify what the reopened hearing should deal with, nor does his letter state that the other counsel who appeared had even been informed of this request. The Board did not see fit to grant this request which was, to say the least, untimely. To cite the Constitution does not suffice to escape the application of section 36(1) of the Regulations. This request to reopen the hearing, which is imprecise, not well supported and untimely, is dismissed.

As for the constitutional argument raised by counsel, although the Board has no obligation to dispose of it in the instant case, it wishes, however, to recall its past decisions on this subject. First, the right to invoke section 15 of the Charter is not open to corporate entities but only to individuals (Maritime Employers' Association (MEA) (1987), 69 di 41; and 17 CLRBR (NS) 355 (CLRB no. 617)). Moreover, section 98(4) does not contravene section 15 of the Charter (Maritime Employers' Association (MEA), supra, and Frederick Transport Limited (1988), 73 di 33; and 88 CLLC 16,021 (CLRB no. 674)).

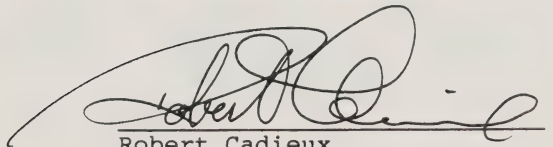
With the exception of Mr. Quérel's complaint, the proceedings instituted by the union and the conclusions sought by the employer are dismissed.



Serge Brault
Vice-Chairman



Ginette Gosselin
Member of the Board



Robert Cadieux
Member of the Board

ISSUED at Ottawa, this 23rd day of April 1990.

information

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Summary

P. LAPRISE, COMPLAINANT, AND ROBIN HOOD MULTIFOODS INC., PORT COLBORNE, ONTARIO, RESPONDENT EMPLOYER. COMPLAINT OF UNFAIR LABOUR PRACTICE (PARAGRAPH 147(a)) OF THE CANADA LABOUR CODE (PART II - OCCUPATIONAL SAFETY AND HEALTH). DISMISSED.

Board File: 950-136

Décision No.: 793

The complainant claimed that Robin Hood Multifoods Inc. violated section 147(a) of the Code by taking disciplinary action against him when he allegedly exercised his right under the Code to refuse work over safety concerns. The assignment involved the training of three employees from another department in preparation for unloading a grain vessel. The respondent denied the claim arguing that the complainant, who had not raised safety concerns on that particular occasion, was disciplined for refusing a work assignment. The complainant later exercised his right of refusal over a different, if somewhat related, incident and was not disciplined.

The evidence revealed that the employer had no reasonable grounds to believe that the complainant was exercising his right of refusal under Part II of the Code when it informed him he would be disciplined. No dangerous situation existed at the time and there was no indication given by the complainant that his refusal was motivated by safety concerns.

The Board dismisses the complaint and stresses the need for an employee to make it reasonably clear that safety concern is the basis for his refusal.

Ce document n'est pas officiel. Les motifs de décision seulement peuvent être utilisés à des fins juridiques.

Résumé de Décision

P. LAPRISE, PLAIGNANT, ET ROBIN HOOD MULTIFOODS INC., PORT COLBORNE (ONTARIO), EMPLOYEUR INTIMÉ. PLAINTE DE PRATIQUE DÉLOYALE (ALINÉA 147a) DU CODE CANADIEN DU TRAVAIL (PARTIE II - SANTÉ ET SÉCURITÉ AU TRAVAIL). REJETÉE.

Dossier du Conseil: 950-136

Décision n°: 793

Le plaignant prétend que Robin Hood Multifoods Inc. a enfreint l'alinéa 147a) du Code en lui imposant des mesures disciplinaires pour avoir exercé son droit, en vertu du Code, de refuser de travailler pour des raisons de sécurité. Son affectation consistait à former trois employés d'un autre service en prévision du déchargement d'un navire d'approvisionnement en grains. L'intimé nie cette prétention et maintient que le plaignant, qui n'avait pas invoqué de motifs de sécurité à cette occasion, avait été l'objet d'une mesure disciplinaire pour avoir refusé d'effectuer un travail. Le plaignant avait par la suite exercé son droit de refus à l'égard d'un autre incident, différent quoique apparenté, et n'avait pas alors reçu de mesure disciplinaire.

La preuve révèle l'absence de motifs raisonnables de la part de l'employeur de croire que le plaignant exerçait son droit de refus en vertu de la partie II du Code lorsqu'il lui a fait part d'une mesure disciplinaire à son endroit. Nulle situation dangereuse n'avait cours à ce moment là et le plaignant n'a pas invoqué des motifs de sécurité pour justifier son refus.

Le conseil rejette la plainte et insiste sur l'obligation faite à l'employé d'être raisonnablement précis lorsqu'il refuse de travailler pour des raisons de sécurité.



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Reasons for decision

Mr. Paul Laprise,

complainant,

on his behalf, the United Food and
Commercial Workers' International
Union,

and

Robin Hood Multifoods Inc.,

respondent employer.

Board File: 950-136

The Board consisted of Mr. François Bastien, Member, sitting as a single member panel pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. Larry Fisher, assisted by Mr. Wayne Galandy, for the complainant; and

Mr. John F. McGee, accompanied by Messrs. Steve Blanchard and Russ Davies, for Robin Hood Multifoods Inc.

I

This complaint was filed with the Board on December 1, 1989 pursuant to subsection 133(1) of the Canada Labour Code (Part II - Occupational Safety and Health). The complainant, Mr. Paul Laprise, alleges that the respondent employer, Robin Hood Multifoods Inc. (Robin Hood), contravened paragraph 147(a) of the Code by taking disciplinary action against him (Mr. Paul Laprise) for having exercised his right under the Code to refuse an assignment for safety concerns relating to particular conditions in a grain elevator.

Mr. Paul Laprise is employed by Robin Hood as an operator in the company's grain elevator in Port Colborne, Ontario. On October 12, 1989, he was advised that the next day he would be relieved of his regular duties to train three warehouse employees to use elevator equipment in preparation for unloading a vessel. On that day, October 13, 1989, he refused this assignment claiming that an eight-hour session was not enough to safely train the three employees in question and that, further, training was the supervisor's responsibility. On October 26, 1989, Mr. Laprise was suspended for one day for his refusal of October 13, 1989.

Robin Hood denied the allegation that Mr. Laprise's refusal was justified by the presence of a safety and health threat. It submitted that the employee in question received a one-day suspension for his refusal of a normal work assignment. The company also stated that Mr. Laprise had filed a grievance under the provisions of the collective agreement, which had passed through steps 1, 2, and 3 of the procedure.

The Board heard the complaint at Toronto on March 12 and 13, 1990.

II

The background facts of the case are not in dispute. Grain vessel unloading is an important, if sporadic, activity in the overall operations of the Robin Hood mill at Port Colborne. It receives eight vessels a year, each with a metric tonnage in the 26 000 - 27 000 range. Assuming a through flow of some 800 tons per hour, the average time taken to unload a vessel is 27 to 28 hours. The unloading process consists in transferring grain from the ship to large storage bins using two conveyor belts, east and west,

that run the length of the storage area. Belts are diverted to the proper storage bin via a tripper mechanism that sits on a rail track. Moving the tripper involves the following tasks: (1) disconnecting it; (2) releasing the brake; (3) removing the suction line; and (4) activating the clutch up or down. These are part of the bin man's duties. The regular unloading procedure, in effect since the installation of a self-unloader system in the early fall of 1987, calls for a 16-hour scheduling of two crews of three employees, each composed of an operator, a relief man and a bin man. This type of scheduling means that on weekdays, eight of these hours will be overtime, and on weekends, all hours worked are overtime.

On Sunday, October 15, 1989, a 21 000-ton vessel was due to arrive at 3:30 p.m. ready for unloading within the hour as per regular practice. In the week preceding the arrival of the vessel, a number of employees, including the complainant, Mr. Paul Laprise, were asked to work overtime on the unloading assignment but refused. The company alleged that this situation resulted from an overtime ban effected by the union following the filing of a grievance in September 1989 involving employees from the elevator department. The move was viewed as a means of pressure to bring a satisfactory resolution of the matter. Employees involved justified their refusal of overtime by invoking health or other personal reasons, or arguing that in any event the collective agreement made it clear that overtime was a voluntary matter.

Faced with a dearth of employees willing to work overtime, the company decided to assign the task to three crews of three employees, each working an eight-hour shift for a

total of 24 consecutive hours. The unloading was to commence at 8:00 a.m. on Monday, October 16, 1989.

This revised plan failed as management still faced assignment refusals from four trained employees including Fred Cronshaw, the union chief steward. Some said they did not want to be taken off their regular duties, while others argued they had allergies or did not want a transfer to a new department even if only on a temporary basis. This was a most unusual situation because, according to the company, employees had no right to refuse transfers. Yet, no disciplinary action was taken against the employees involved, for the company had "no desire to add fuel to the fire" in the words of assistant plant manager, Steve Blanchard.

As its next course, it decided to redeploy junior employees from another department and use them for unloading. Hence the training assignment asked of Mr. Paul Laprise on October 12, 1989. The company's idea was to limit this training to the basic duties of the bin man, namely the operation of the tripper mechanism and the reporting and handling of emergency situations such as grain spills and overheating "idlers" (or bearings) on the conveyor belts.

Mr. Laprise was first asked to train the three union employees on Thursday, October 12, 1989 by Mr. Russ Davies, plant operations manager. In his testimony, Mr. Davies stated that he spoke twice to Mr. Laprise that day concerning his training assignment, first, in the morning when Mr. Laprise reported to work, and then in the afternoon around 4:00 p.m. over the walkie-talkie. Mr. Laprise did not recall the first conversation, but did not challenge Mr. Davies' account of the tenor of the afternoon one. When

advised that he would be relieved of his regular duties to train three junior employees on unloading procedures, Mr. Laprise replied he did not think he could do it because an eight-hour session was not enough, and that training was the supervisor's responsibility. In view of the seriousness of this refusal, he was asked by Mr. Davies to think of the consequences and to reconsider. Mr. Laprise reiterated his previous position and, according to Mr. Davies, never expressed safety concerns.

The next day, October 13, Paul Laprise refused to do the training restating his position. Following his refusal, a meeting took place between R.H. Davies and S. Blanchard from the company side and the complainant and F. Cronshaw, the union steward. This meeting lasted about 20 minutes and involved discussions of both the training time requirement and the training responsibility issues. Both Messrs. Davies and Blanchard testified that no safety concerns were discussed at that meeting. At the end of the meeting Mr. Laprise was advised that he would get a suspension for refusing his day's assignment, the time and duration of which would be communicated to him at a later date. This was put in writing to the complainant in a note sent to him the same day by Mr. Davies. Another note was sent the same day to Mr. S. Blanchard from the union local president, Jim Allan, detailing the relief man's duties and arguing that the fact that the three employees in question were not trained in these duties posed a safety threat to all the employees in the plant. A meeting of the safety and health committee was scheduled for 9:00 a.m. the following Monday, October 16, 1989, as management intended to clarify the role of the three employees in the unloading operations. In the meantime, Mr. Laprise returned to his regular duties and Mr. Davies went on to train the employees in question.

This training session given by Mr. Davies differed substantially from the one normally provided to new employees of the elevator department. It lasted less than one hour and limited itself to a presentation of a schematic flow of the grain movement in the elevator, a tour of the elevator area together with an identification of the main equipment to be used in emergency situations (fire exits, fire alarms, walkie-talkie units), and relevant monitoring and operating procedures.

Monday, October 16, 1989 was marked by another refusal to work by the complainant and by a rapid succession of events. The complainant refused work in the unloading area, alleging this time concern over his safety caused by the insufficient training received by the individual assigned to the bin man's position. Labour Canada's safety officers were called to investigate the refusal, which they did later in the morning, having arrived on the site around 11:00 a.m. Following this inspection, the company was found in breach of a number of safety provisions, including insufficient training for the three employees concerned. A verbal direction was issued to the company that same day, later confirmed in a letter from Chris Mattson, a Labour Canada safety officer, to Robin Hood's Lloyd R. Simmonds, plant manager. What this meant was that in the judgment of a Labour Canada safety officer, Paul Laprise had, indeed, reasonable cause to refuse work that morning pursuant to section 128(1) of the Code.

On that same morning, a meeting of the plant safety and health committee was held around 9:00 a.m. As seen earlier, this meeting was called by management in response to the union local president's memo of Friday, October 13, and was meant to help clarify the role of the three employees in the

unloading operation. Present at the meeting were S. Blanchard and R. Davies on the company side, and W. Gallandy, F. Cronshaw, K. Lallouet, M. Soucie and C. Cook on the union side. After management representatives explained how the unloading would be done using the newly trained employees, a long discussion ensued with the union arguing strongly that the three employees were not properly trained, and management countering that the training received was adequate given the very basic functions they were asked to perform. The meeting ended inconclusively. Later in the morning, the committee would be seized of the matter of Mr. Laprise's work refusal in the unloading area, thereby setting in motion a process that would culminate in the decision of a safety officer from Labour Canada supporting Mr. Laprise's right of refusal over safety concerns.

III

The instant complaint made pursuant to subsection 133(1) of the Code alleges that the employer contravened paragraph 147(a) by unlawfully disciplining the complainant because he had acted in accordance with subsection 128(1) of the Code. Subsection 128(1) reads as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

The relevant part of paragraph 147(a) provides:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part."

In trying to determine if Robin Hood contravened paragraph 147(a) of the Code in imposing a one-day suspension on Mr. Laprise for his refusal of October 13, 1989, the central question the Board has to ask itself is whether this disciplinary action was taken as a result of Mr. Laprise exercising, judiciously or not, his right to refuse work because of concerns over his safety. In cases of this type, the Board must keep a very sharp focus on the actions of the respondent throughout the relevant time period, and satisfy itself ultimately that these were in no way undertaken to restrain or restrict the free exercise of an employee's right to refuse work because of a real or perceived danger to his health or safety. This is, as I understand it, the sense of the shifting of the burden of proof to the employer in matters involving the exercise of the right of refusal under Part II of the Code. Specifically, subsection 133(6) states:

"133.6 A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

IV

Before I turn to the evidence per se, I would like to note that, throughout the hearing into this complaint, there were many views expressed, and much scientific evidence cited or referred to by the complainant's representative on the generic safety and health dangers affecting the grain industry, such as dust explosion and fire, major spills and respiratory problems. In addition, a good deal of the union's evidence and argument focused on the general safety and health conditions at the plant and its overall safety record of the recent past. As I indicated during the hearing, these conditions, circumstances or factors present some interest in that they help understand the particular context in which individual safety and health decisions are made. However, they remain of strictly incidental value and are not matters the Board is either asked or willing to decide.

In reviewing the evidence before it, the Board paid special heed to the precise sequence of events leading to the decision to impose a one-day suspension on Mr. Laprise for refusing his training assignment. This is a particularly crucial aspect of the case as it relates to the possibility that Mr. Laprise's unchallenged work refusal of Monday, October 16, 1989, might have led the company to react or respond the way it did to the October 13 incident. For instance, the representative of the complainant made the coupling of the Friday and Monday events the central point of his argument, stressing that both refusals stemmed from the same concern Mr. Laprise had over the insufficient training given to the new employees.

What is the evidence before the Board regarding the company's handling of the complainant's refusal when first

told about it on Thursday, October 12, 1989 and, then, the following morning? The testimony of the plant operations manager, Mr. R. Davies, unchallenged by the complainant, makes it clear that (a) Mr. Laprise was warned immediately of the seriousness of his refusal and its likely consequence; and (b) this refusal was serious because, in Mr. Davies' mind, it amounted to rejecting a normal work assignment as Mr. Laprise had been involved before with training new employees. This last point was expressed to the complainant. There is no evidence to suggest at this stage that safety considerations were present or invoked by Mr. Laprise.

The circumstances of when the issue of safety was first raised by Mr. Laprise remain unclear. The testimony of the complainant and of the local union president, Jim Allan, to the effect that the occasion was the meeting held on Friday morning in response to Mr. Laprise's refusal is at variance with that of Messrs. Davies and Blanchard. Mr. Laprise's recollection of the conversation seemed a little hazy, and he acknowledged he did not participate actively in the discussion. What is clear, however, is that this key meeting dealt primarily with the question of the responsibility for training - a longstanding point of contention between the parties - and the amount of time required to provide adequate training to the three warehouse employees. The Board is left with a sense that if the issue of safety surfaced at all at that particular meeting, it must have been by way of an incidental remark or by inference drawn from the training time argument.

In the absence of clear evidence indicating that the complainant invoked a safety concern at the time he refused his training assignment, what then of the union argument

that it is what Mr. Laprise had in mind that counts in determining the matter? The question of the complainant's motive cannot be properly answered without a clear reference to the concept of reasonable cause. True enough that the Board has given this concept in the past the broadest interpretation possible (Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); John Charters, (1989), 3 CLRBR (2d) 253 (CLRB no. 727); and William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332)) making it abundantly clear in each case that erring in deciding whether something is dangerous or not is no reason to deny an employee his right to refuse work if he genuinely believes his safety is at risk. In other words, it is not unreasonable to be wrong.

However, the problem poses itself in clearly different terms in the instant complaint if only because it involves two distinct work refusals, i.e. those of Friday, October 13 and Monday, October 16, which are alleged by the complainant to have a single cause, namely Mr. Laprise's concern over insufficient training, and the danger it posed to him and his co-workers. Further, only the refusal of Friday, October 13 is at issue before the Board as it led to the complainant's suspension. As we know, Mr. Laprise was not disciplined for his refusal of Monday, October 16, 1989.

Let us take a closer look at the linkage argument. Coupling the two refusals through a singleness of intent and perception of danger raises the question of immediacy as an essential trait of any danger as defined in the Code. In David Pratt, (1988), 1 CLRBR (2d) 310 (CLRB no. 686), the Board has stated vigorously that, notwithstanding the removal of the word "imminent" following the 1984 amendment, the definition of danger in the Code retained an essence of immediacy:

"... the right to refuse is not the primary vehicle for attaining the objectives of Part IV of the Code. It is there to promote early recognition of hazards so that they are brought to the attention of those responsible for safety in the work place. The right to refuse is also an emergency measure to deal with dangerous situations which crop up unexpectedly. In that context, it becomes clear why danger is defined as it is. The purpose of the right to refuse is not to settle longstanding disputes or to bring to a head differences involving technology or production practices. (See William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); and Ernest L. LaBarge (1981), 47 di 18; and 82 CLLC 16,151 (CLRB no. 357).) The right to refuse is there to deal with situations which require immediate attention, hence the requirement for immediacy in the definition of danger. ..."

(page 318)

The evidence adduced clearly shows that there was nothing in Mr. Laprise's work environment on Friday morning that suggested or pointed to some form of danger within the meaning of the Code: the use or operation of a machine or thing, or the existence of a condition that constituted a danger to the employee or to another employee? Mr. Laprise admitted during his cross-examination to not being in the presence of any of those things or conditions when he refused to train the warehouse employees. The fact that he had previously done a lot of similar training, albeit in longer time frames and on a one-on-one basis, and that he has since returned to his training duties is also a strong indication of the absence of a readily identifiable element of danger at the time he refused his training assignment. Assuming Mr. Laprise's refusal was motivated by a genuine safety concern, the object of that concern ought to have been a future state of events and not the training assignment per se, which by his own admission did not constitute a dangerous situation. As it turned out, this precise state of events did unfold the following Monday when Mr. Laprise duly exercised his right of refusal.

What this establishes is that Mr. Laprise's work environment on October 13 was clearly deprived of any identifiable element that might have signalled to his supervisors that he was acting out of a true belief that his safety was at risk. When faced with the complainant's refusal, Mr. Davies was confronted with a situation where no safety motive was invoked and no readily identifiable danger was present. The Board believes Mr. Davies when he says he disciplined Mr. Laprise for refusing a normal work assignment.

This point brings me to another aspect where this complaint is different from the other cases referred to. It is the clarity with which an employee reports or communicates a safety concern as a basis for his action. This element never seemed to be at issue in the cases referred to above or cited in support of the union position. However, it is in the present one. During his testimony, Mr. Laprise told the Board that he was aware he had the right to refuse work over safety concerns but did not know the proper procedure. Yet, it seems strange that when warned on the Thursday afternoon and the Friday morning of disciplinary action, he replied in terms of training time and responsibility, not safety ones. This is not to suggest a restricted or overly procedural manner or form in which this concern has to be expressed or reported. Indeed, in John Charters, supra, the Board said:

"... there is no magic in the words contained in the Code, they need not be uttered by a refusing employee. Provided that it is clear that an employee is refusing to work because of a concern for danger to themselves or to another employee, the obligation to report the matter to the employer under section 128(6) is fulfilled. ..."

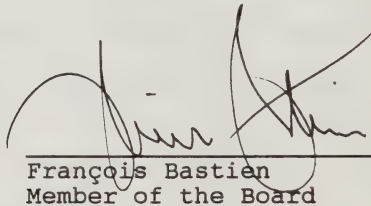
(page 263)

As noted above, this clarity of a safety-related motive is missing in this case, with the result that there was never

any doubt in the supervisor's mind that Mr. Laprise was being disciplined for refusing a training assignment over reasons other than safety.

Finally, the Board, in keeping with its oft-stated policy (see John Charters and William Gallivan, supra), has remained mindful of the possibility of labour relations motives behind this refusal. It found no conclusive evidence that these motives played a direct role in Mr. Laprise's decision. Suffice it to say that the fact that normal overtime practices were somewhat perturbed at the time, and that the longstanding difference between the parties regarding their responsibility vis-à-vis training came to the fore again at the crucial Friday morning meeting, contributed to the poor quality of the dialogue between the parties over this matter.

Based on all these considerations, the Board is convinced that the respondent employer did not discipline Mr. Laprise for his action of October 13, 1989 because he had exercised his right of refusal under Part II of the Code. The complaint is therefore dismissed.



François Bastien
Member of the Board

ISSUED at Ottawa, this 27th day of April 1990.

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Only the reasons for Decision can
be used for legal purposes.

Summary

INDEPENDENT CANADIAN TRANSIT UNION,
APPLICANT, AMALGAMATED TRANSIT
UNION, LOCAL 1374, BARGAINING
AGENT, AND GREYHOUND LINES OF
CANADA LTD., WESTERN CANADA,
EMPLOYER.

Board File: 555-3040

Decision No.: 794

RAID SITUATION. Interim decision.
Section 20(1) of the Canada Labour
Code (Part I). Second application
for reconsideration (section 18).
Denied. Application for
certification (section 24).
Dismissed.

The Board allowed ICTU to withdraw
a first application for
certification filed against Local
1374. ICTU had filed a second
application before obtaining leave
to withdraw the first one. Both
applications filed during open
period. Leave to withdraw was only
granted after the end of open
period. Board considered second
application and ordered vote
between the two unions.

Local 1374 asked for
reconsideration under section 18
on two grounds.

WITHDRAWAL. Section 31 of Board
Regulations (six-month time-bar
between applications). The Board
found that section 31 was not
applicable since it only applies
when a first application is
dismissed. Here it was withdrawn.

Ce document n'est pas officiel.
Seuls les motifs de décision
peuvent être utilisés à des fins
juridiques.

Résumé de décision

LE SYNDICAT CANADIEN INDEPENDANT
DU TRANSPORT, REQUERANT, LE
SYNDICAT UNI DU TRANSPORT, SECTION
LOCALE 1374, ET GREYHOUND LINES OF
CANADA LTD., OUEST CANADIEN,
EMPLOYEUR.

Dossier du Conseil: 555-3040

No de Décision: 794

MARAUDAGE. Décision partielle,
paragraphe 20(1) du Code canadien
du travail (Partie I). Deuxième
demande de révision en vertu de
l'article 18 du Code. Rejetée.
Demande d'accréditation (article
24). Rejetée.

Le Conseil a permis au SCIT de se
désister d'une première demande
d'accréditation présentée en vue
de déloger la section locale 1374.
Le SCIT a présenté une deuxième
demande d'accréditation avant
d'obtenir la permission du Conseil
de se désister de la première.
Les deux demandes ont été
présentées au cours de la période
ouverte. La demande de désistement
n'a été accordée qu'après la fin
de la période ouverte. Le Conseil
s'est saisi de la deuxième demande
et a ordonné un scrutin entre les
deux syndicats rivaux.

La section locale 1374 a contesté
cette décision et demandé son
réexamen en vertu de l'article 18,
sous deux chefs.

DÉSISTEMENT. L'article 31 du
Règlement du Conseil (Interdiction
de présenter deux demandes
d'accréditation successives en
moins de six mois). Motif rejeté
vu que l'article 31 ne s'applique
pas lorsqu'une première demande est
retirée sans être rejetée par le
Conseil.



TIMELINESS. The second ground dealt with timeliness. Local 1374 argues that since withdrawal was only granted by the Board outside the open period, the second application was untimely. The Board rejected the argument. The application had actually been filed during open period. Analysis of section 31 of Regulations. Analysis of effect of withdrawal.

Following a vote between the unions, Local 1374 obtained majority support. ICTU's application for certification was dismissed.

PRESCRIPTION. Le second motif avait trait à la prescription. La section locale 1374 a plaidé qu'elle avait obtenu la certification du Conseil, ayant accordé l'avis de désistement de la première demande en dehors de la période ouverte. La seconde demande était prescrite. Le Conseil a rejeté l'argument. La demande avait été présentée au cours de la période ouverte. Analyse de l'article 31 du Règlement. Analyse de l'effet du désistement. La demande de révision de la section locale 1374 a été rejetée.

Par suite de la tenue du scrutin, la section locale 1374 a obtenu la majorité. La demande d'accréditation du SCIT a été rejetée.

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Reasons for decision

Independent Canadian Transit Union,
applicant,

Amalgamated Transit Union, Local
1374,

bargaining agent,

and

Greyhound Lines of Canada Ltd.,
Western Canada,

employer.

Board File: 555-3040

The Board was comprised of Mr. Serge Brault, Vice-Chairman,
and Mr. Victor E. Gannon and Ms. Linda M. Parsons.

These reasons for decision were written by Mr. Serge
Brault, Vice-Chairman.

Counsel on record:

Mr. W.J. Johnson, for the Amalgamated Transit Union, Local
1374;

Mr. Michael P. McEvoy, for the Independent Canadian Transit
Union; and

Mr. Mel F. Belich, for Greyhound Lines of Canada Ltd.

These reasons for decision were issued following a telex
sent to the parties on April 11, 1990, notifying them of
this decision and of the fact that detailed reasons would
follow.

I

THE APPLICATION

This is an application for reconsideration filed pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) on behalf of the Amalgamated Transit Union, Local 1374 ("Local 1374"), to have the Board ultimately amend or annul a decision issued January 11, 1990 and confirmed in March of this year. In January, the Board granted a request by the Independent Canadian Transit Union ("ICTU") to withdraw a first application for certification it had filed (555-3013) on October 2, 1989. It wanted to displace Local 1374 as bargaining agent for the drivers of Greyhound Lines of Canada. In the same decision, the Board went on to consider a second application for certification filed by the ICTU on November 24, 1989 and ordered a vote to ascertain union support between the two rival organizations.

The gist of ICTU's request to withdraw its first application was that in its national drive to displace Local 1374, it had been misled about the status of certain persons that were likely covered by Local 1374's certification. It argued that it wanted to withdraw its initial application in order to solicit support within the group left out the first time around and, it was hoped, be able to apply a second time. Without waiting for the Board's decision on its request to withdraw, it filed a second application in November 1989, still well within the open period.

That Board decision granting withdrawal and ordering the vote was forwarded to the parties by the Registrar on January 11, 1990. The Registrar wrote:

"... Having studied the submissions of the parties concerned, the Board has found it appropriate, in the interests of good labour relations, to grant withdrawal of file 555-3013, to allow the filing of the new application, our file 555-3040, and to order a representation vote in that file."

(emphasis added)

It is that decision which was the subject of Local 1374's first application for reconsideration in February 1990. First, it argued that the Board should not have allowed, for policy reasons, the withdrawal of the initial application for certification. Secondly, it argued that the Board should not have allowed that a second application for certification be "filed" after the first one was withdrawn. In its view, the open period to displace Local 1374 had already elapsed by January 11, thereby rendering untimely the "filing" of the second application.

That first application for reconsideration was rejected as ill-founded in a letter-decision LD 784 issued on March 6, 1990.

II

THE APPLICANT'S SUBMISSIONS

This leads us to this second application for review. Obviously, Local 1374 was not satisfied with our March 6, 1990 decision declining to reconsider. It argues that no reason or no sufficient reason was given in support

of our decision to grant the withdrawal of the first application and to entertain the second one. It adds that its second application for reconsideration is genuine and not a mere repetition of the earlier one.

According to Local 1374, the Board could not rightly be seized of the second application for certification filed by ICTU since that application could not be considered to have been filed before permission to withdraw the first one was granted on January 11, 1990, i.e. after the termination of the open period. According to Local 1374, the Board did not properly apply section 31 of its Regulations when it ignored that argument and went on to proceed on the merits of the second application for certification.

III

THE LAW

The Board has long established a policy whereby a party may not unilaterally withdraw an application or a complaint without the Board's permission (see Cape Breton Development Corporation (1977), 20 di 301; [1977] 2 Can LRBR 148; and 77 CLLC 16,104 (CLRBR no. 85); Bell Canada (1979), 30 di 104; and [1979] 2 Can LRBR 429 (CLRBR no. 191); Terminal Maritime Pointe-au-Pic (1984), 50 di 240 (CLRBR no. 477).

Section 31 of the Regulations reads as follows:

"31. Where the Board has refused an application from a trade union for certification as the bargaining agent for a unit, the Board shall not thereafter receive another application from the trade union for certification in respect of the same or substantially the same unit until six months has elapsed after the day of refusal unless the Board, on the application of the trade union,

*abridges that time pursuant to paragraph 16(m)
of the Code."*

(emphasis added)

That provision deals with the effect of the dismissal of an application for certification. The wording is clear and does not warrant interpretation.

Many reasons warrant a policy with respect to withdrawals. In the case of certifications, since the dismissal of an application is sanctioned by a time bar preventing the filing of a new one for a period of six months, a union exposed to losing a loosely organized campaign could be tempted to by-pass the time-bar regulation by resorting to a unilateral withdrawal. This way, its first attempt at certification would escape formal dismissal, i.e. escape being "refused" pursuant to section 31 of the Regulations.

In order for the time-bar provision to work properly, a unilateral withdrawal must not be allowed without at least the other side being afforded an opportunity to argue for a formal dismissal. The practical purpose of that provision is to avoid repetitive attacks on an incumbent bargaining agent. Also, in the case of a first organization, it is aimed at preventing that the climate in a union-free business be repetitively threatened by ill-fated union drives. But section 31 of the Regulations is not aimed at preventing a genuine, serious organization to succeed even shortly after a first defeat.

When it first had to issue its policy pertaining to section 31 of the Regulations, the Board took a position

similar to that followed in British Columbia and in Ontario. With respect to raids, it approved a policy inspired by then Chairman Paul Weiler from British Columbia:

"The British Columbia Board has had also to rule on section 49 of the Labour Code of British Columbia which confers on it the discretion to allow subsequent applications for certification at any time or impose a ninety-day limitation. In Western Canada Steel, [1976] 1 Can LRBR 19, Board Chairman, Paul Weiler, indicated that the ninety-day limitation should not normally be imposed unless the applicant union tried to obtain a second vote based on the same evidence of union membership. He also stated that in cases of raiding, it would be appropriate to use the ninety-day limitation to prevent consecutive raids from taking place in the same period permitted by the Code (in our case, in the period permitted by section 124(2)(c)). He also stated that it would be inconsistent with the same principle underlying the ninety-day limitation to forbid a second application for certification in the case of a raid that would, for all practical purposes, have been successful. At pages 23 and 24, the Board had the following to say:

'In our judgment, it is highly undesirable as a matter of policy to assume that the Code should automatically bar such applications [for uncertified units] if the first one fails... in our view, time-bars should normally be designated under section 49 so as to prevent the same union launching two raids on a bargaining unit in the one open season... this is not a situation where a trade union applied for certification, lost the representation vote, and then immediately applied under section 39(2) relying on the same employee membership to secure the second vote. In that case, after reviewing the second application but before considering it, the Board would in all likelihood impose a bar against considering any such application brought within the 90-day period. ... The point of a section 49 time-bar is to minimize the disruption in the plant from organizational campaigns and legal debates over certification cases. But at Western Canada Steel, once the new local was chartered, the employees signed up, and the new application made, most of the possible damage had been done. To apply section 49 in these circumstances would in effect be to lock the barn door after the horse had been taken. Indeed, the imposition of section 49 would almost certainly be counter-productive. Once a majority of the employees had developed sufficient interest in a second raid to sign

up in the new local, the use of a legal device such as section 49 to deprive them of the vote they expected would generate more employee unrest than any other action would. For reasons we have stated earlier, we believe that it is particularly appropriate to use section 49 to prevent repeated raids by a single union in the same open season. However, it would be quite inconsistent with the legal policy embodied in section 49 to use the provision to abort a raid which had reached the late stages of this one.'

It is our opinion that the principle established by the Ontario and British Columbia jurisdictions should also be applied in our jurisdiction."

(Bell Canada, supra, pages 107-108; and 432-433)

IV

INITIAL DECISION BY THE BOARD

Turning to the facts of this case, we see that after filing its first application, ICTU realized at some point that it could be doomed. It immediately asked to withdraw that application and soon filed a second application for certification, this time, at least in its view, in accordance with the Code. This second application was filed without waiting for the formal withdrawal of the first one to be granted by the Board. Had section 31 not been there, permission to withdraw the first one would not have been needed. The corollary to the policy against unilateral withdrawal is that any application filed with the Board remains subject to formal dismissal, even after the applicant expresses the wish to abandon it altogether.

Had the law been different, Board staff would not have given the respondent Local 1374 the opportunity to make

submissions against the withdrawal. It may appear somewhat puzzling and masochistic that a union wishing to quit raiding another union would be challenged on that withdrawal by the very union it proposes to stop trying to displace! Yet, the answer is simple: the incumbent union knows that if the raiding union's application is not formally dismissed, the invader could try again the next day.

The policy reasons the Board had in January 1990 to grant ICTU's request to withdraw its first application for certification still stand. They were precisely those of Chairman Weiler outlined earlier. They were reiterated by our March 6, 1990 refusal to reconsider that decision.

V

FIRST DECISION ON RECONSIDERATION

a) Consideration of the Second Application for Certification

According to Local 1374, when the Board agreed in its January 11, 1990 decision to the "filing" of the second application for certification, and went on to consider it, the Board automatically erred since it examined an application filed before the withdrawal of the first one had been granted.

That point was dismissed in our March 6 decision as being contrary to the Code and the Regulations. This repeated application for reconsideration by Local 1374 provides us with the opportunity to expand on that ruling.

Section 31 deals with cases where an application is dismissed. Then a new application may not be made before a six-month period has elapsed, except with the permission of the Board. A contrario, if an application is not dismissed, permission is not needed since no time-bar provision is applicable.

Local 1374 may have been misled by our January 11 letter where it was written that ICTU was "allowed to file" a second application. This may have been a poor choice of words influenced in fact by the words used by ICTU in its request to withdraw. Be that as it may, the fact and the law remain the same: ICTU would only have needed leave to make its second application if its first one had been rejected. The fact is the application was withdrawn.

When examined closely, the first argument raised by Local 1374 boils down to saying that a party may not even file a second application for certification while its earlier application is pending, even if the Board later grants permission to withdraw the first one and thereby decides not to dismiss it. To retain this argument would render section 31 meaningless in the sense that a Board decision to allow the withdrawal of an application would have the same effect as a decision to dismiss it: in both cases, the applicant would still need the Board's permission to "file" a new application.

In the Board's estimation, that argument plainly was not and is not supported by the wording and the purpose of section 31 of the Regulations.

b) The argument about timeliness

When the Board granted withdrawal of the first application in January 1990, the open period was over. In the view of Local 1374, the second application is untimely since it cannot be considered to have been filed prior to the Board granting the withdrawal. This argument is in fact a different presentation of the first argument.

In most, if not in all jurisdictions, the commonly accepted effect of a withdrawal is to put the parties back in the position they would have been if the application withdrawn had not been made in the first place. That is what a withdrawal is all about. It is retroactive by nature, in the sense that it technically erases from the start the procedure being discontinued.

We see no reason not to give it the same effect in this jurisdiction. Moreover, had it not had such an effect, the policy against unilateral withdrawals would be superfluous.

Turning to the case at bar, when the Board allowed the withdrawal of the first application, legally speaking, it more or less retroactively erased it from the picture. It follows that if the first application was no longer deemed to be there, nothing prevented ICTU from filing their second application as long as it did so during the open period. No leave was technically required. That is how things stand under the Code. Since ICTU's second application was, in fact, filed during the open period, there was no obstacle to it being considered on its merits and the Board did not need to "allow it to be filed," after it had allowed the withdrawal.

There are sound labour relations considerations for such an apparently legalistic approach. A key factor in a union organization drive is time, i.e. speed. It is tied to a key element in the certification process which is the date of filing of an application for certification. More precisely, it is on the basis of the number of persons employed on that date, that the Board will usually ascertain union support within the work-force. We say "usually" because Parliament has drafted section 28(c) of the Code in the following terms:

"28. Where the Board

...

(c) is satisfied that, as of the date of the filing of the application or such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."

(emphasis added)

Parliament specifically entrusted the Board with the discretion to assess union support at a date other than that of filing of the application. This allows the Board to take into account valid reasons justifying that another date be considered; the thrust of that discretion is that the Board might not have a true picture of the employees' will if the process was cast in stone. The purpose of the discretion conferred on the Board under section 28 is very close to that found under section 31 of the Regulations. Both turn around union support. (See Bell Canada, supra.)

In this case, the Board allowed the applicant to withdraw its first application and chose to entertain the one filed at a later date. What the Board did was no more than decide to assess union support at a date later than that of the initial application. Had we chosen to exercise our discretion under section 28 of the Code and decided to assess union support with respect to the first application not on the date it was filed but rather on November 29, the results for Local 1374 would have been the same. A vote would have ensued.

As mentioned, Local 1374 argued that the second application was untimely because the withdrawal of the first one was only granted after the open period had elapsed.

This formalistic approach apart from not being compatible with the legal effect of a withdrawal, is not conducive to sound labour relations. It would mean that the right of a party would vary depending on the Board's ability to render a decision in a given time frame. If the Board, as it did here, made its decision to grant permission to withdraw after the open period, it could no longer consider a second application filed earlier, even if such application was filed in a timely fashion.

The Board has no actual control over the applications filed before it, but it does have control over what it will or will not entertain and we do not see that section 31 means more than that. A party may always file an application, even where it is subject to some form of leave to do so, but the Board may later refuse to entertain such application if it finds that the applicant should not be granted leave. This is in complete harmony

with the policy set out in Bell Canada, supra, where the B.C. Board differentiated between reviewing an application and actually considering it.

VI

FINAL DISPOSITION OF APPLICATION FOR RECONSIDERATION

Section 31 of the Regulations as well as section 24 of the Code are both aimed at enabling employees to exercise their right to join, to change or to quit unions. What the Board did in its January 1990 decision was aimed at enabling these rights to be exercised and we see no valid ground to reconsider that decision.

It is true however that our January 11 decision should have been conveyed to the parties differently. It should have read that the Board had granted the withdrawal and that ICTU's second application would be "entertained" rather than be allowed "to be filed." Obviously, it had already been filed and it was timely.

For all these reasons, we find that Local 1374's second application for reconsideration does not raise any argument or fact that has not already been considered. It is accordingly dismissed.

VII

FINAL DISPOSITION OF THE APPLICATION FOR CERTIFICATION

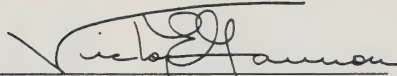
When the second application for reconsideration was filed, the Board's returning officer was getting ready to proceed with the counting of the ballots cast by the employees following the vote ordered in January. Although he had the authority as returning officer to make such a decision on his own, the officer consulted with this panel, through the undersigned Vice-Chairman, on the appropriateness of postponing the counting until the Board had disposed of the second application for reconsideration.

The filing of an application for reconsideration does not have the effect of staying the Board's decision under review. Yet, in consultation with its returning officer, the Board found that it was better in this case to postpone the counting until after the Board would have considered the second request to review. We found that if the panel upheld Local 1374's latest application for reconsideration, it might end up cancelling the vote altogether and confirming Local 1374 as the bargaining agent. In such a case, the disclosure of the results of the vote could unfairly prejudice the union. We therefore confirmed the returning officer's authority to postpone the counting of the vote, which he did. As a matter of fact, the process was only delayed by 48 hours since our finding concerning this application was telexed to the parties as soon as a decision was reached.

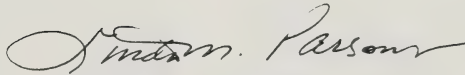
As it turns out, the counting took place April 18, 1990; ICTU, the applicant in certification, did not have the required support. Accordingly, we dismiss its application.



Serge Brault
Vice-Chairman



Victor E. Gannon
Member of the Board



Linda M. Parsons
Member of the Board

DATED at Ottawa, this 11 day of May 1990.

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Summary

DON GREENWOOD ET AL, COMPLAINANTS,
CANADIAN UNION OF POSTAL WORKERS,
RESPONDENT UNION, AND CANADA POST
CORPORATION, EMPLOYER.

Résumé de Décision

DON GREENWOOD ET AUTRES,
PLAIGNANTS, LE SYNDICAT DES
POSTIERS DU CANADA, SYNDICAT
INTIMÉ, ET LA SOCIÉTÉ CANADIENNE
DES POSTES, EMPLOYEUR.

Board File: 745-3435

Decision No.: 795

Dossier du Conseil: 745-3435

No de Décision: 795



The president of the Nova local (Halifax-Dartmouth area) of the Canadian Union of Postal Workers failed to present a grievance within the time limit specified in the collective agreement. The grievance had to do with an overtime pay claim by Dartmouth letter carriers. They complained to the Board that the failure to file the grievance in a timely fashion constituted a breach of C.U.P.W.'s "duty of fair representation" and was contrary to section 37 of the Canada Labour Code (Part I - Industrial Relations).

The Board concluded that the failure to file was caused, among other things, by an inordinate delay on the part of the letter carriers in presenting the grievance to the local president; that the latter was completely preoccupied with other important union matters on the day the grievance was given to him and during the three remaining days before the time limit came into effect; that there was no evidence his conduct was designed to discriminate against or get back at C.U.P.W. rivals in the letter carrier group; and that the failure to file could not be characterized as serious negligence or incompetent or perfunctory conduct, as those terms have been defined in Board jurisprudence.

The Board decided that the local president had simply made an honest mistake which could not be seen as a violation of Section 37. The complaint was dismissed.

Le président de la section locale Nova (région de Halifax-Dartmouth) du Syndicat des postiers du Canada n'a pas respecté les délais prévus par la convention collective lorsqu'il a déposé un grief selon lequel les facteurs de Dartmouth réclamaient une indemnité d'heures supplémentaires. Ces derniers ont déposé une plainte devant le Conseil alléguant que le fait de ne pas avoir déposé le grief dans les délais prescrits constituait une violation du «devoir de représentation juste» du SPC et contrevenait à l'article 37 du Code canadien du travail (Partie I - Relations du travail).

Le Conseil a conclu qu'une des raisons pour lesquelles le grief avait été déposé hors délai était, entre autres, le retard inhabituel qu'avaient pris les facteurs pour présenter leur grief au syndicat, que ce dernier était intensément préoccupé par d'autres affaires importantes du syndicat le jour même où le grief lui a été présenté ainsi que pendant les trois jours suivants qui restaient avant que le délai ne prenne fin, qu'il n'existait aucune preuve selon laquelle la façon d'agir du syndicat visait à faire de la discrimination envers des rivaux du SPC au sein du groupe des facteurs ou de s'en venger et que le manquement à déposer le grief dans les délais prescrits ne pouvait être caractérisé de négligence sérieuse ou d'action incompétente ou superficielle selon la définition de ces termes adoptée dans la jurisprudence du Conseil.

Le Conseil a jugé que le président de la section locale avait tout simplement fait une erreur et que celle-ci ne pouvait être interprétée comme une violation de l'article 37. La plainte a été rejetée.

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Reasons for decision

Don Greenwood et al,
complainants,
Canadian Union of
Postal Workers,
respondent union,
and
Canada Post Corporation,
employer.

Board File: 745-3435

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Robert Cadieux and Michael Eayrs.

Appearances:

Susan D. Coen, for the complainants, Messrs. Greenwood et al;

Raymond F. Larkin, for the respondent union, Canadian Union of Postal Workers, and

Philip Dempsey, for the employer, Canada Post Corporation.

The reasons for decision were written by Vice-Chairman Eberlee.

I

A complaint alleging violation of the "duty of fair representation" by the Canadian Union of Postal Workers (C.U.P.W.) was filed on behalf of Don Greenwood and a number of his fellow letter carriers and supervisory letter carriers at Dartmouth Main Postal Station on or about November 10, 1989. It was claimed in the complaint that the union local president had failed to present to Canada Post Corporation (CPC) a grievance from Mr. Greenwood and his colleagues within the required time limit and that this constituted a breach of section 37 of the Canada Labour

Code (Part I - Industrial Relations). Section 37 reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

A hearing was held by the Board in Halifax on April 10, 1990.

II

This matter had its immediate origin in certain events which took place on July 31, 1989 at the Dartmouth Main Postal Station. That morning, the Dartmouth letter carriers were already engaging in their 38 morning "walks" when two "tainers", holding altogether some 1,000 pieces of mail, arrived at the postal station about 10:30 a.m. At noon when the letter carriers had finished their morning rounds, management directed them to deliver this late mail, which meant they had to return to some addresses on the morning portion of their walks before going on to complete their day's work. Apparently all the letter carriers were able to finish their walks within their regular hours of work, without having to work overtime, despite this extra delivery load. There were rumblings and grumblings in the group about this apparently unusual additional workload, but the letter carriers did nothing about it until David Glennie came on the scene around August 10.

Mr. Glennie is a gentleman whose history in and with the Canadian Union of Postal Workers is interesting, to say the least. He was a letter carrier at Dartmouth and active in the Letter Carriers Union of Canada. Late in 1988, another

panel of this board decided to combine the bargaining units in Canada Post represented by the Letter Carriers Union and C.U.P.W. (along with two or three other small units) into one over-all operations unit covering the entire CPC Canada-wide system. A vote conducted by the Board resulted in the Letter Carriers losing out to C.U.P.W. as bargaining agent for the big new unit.

When C.U.P.W. took over, Mr. Glennie was among members of the LCUC local executive who were appointed to assist in the transition to full C.U.P.W. representation. Early in March, 1989, he became a C.U.P.W. staff member; then in May, 1989 he was elected to a full-time, salaried post on the Atlantic regional executive of C.U.P.W.

On August 8, 1989, Mr. Glennie (and others) were suspended from C.U.P.W. office by the national executive board of C.U.P.W. for continuing to hold office in, and promoting the interests of, the Letter Carriers Union, which was perceived to be seeking to oust C.U.P.W. Prior to the elimination of LCUC as an actual bargaining agent for employees of Canada Post, Mr. Glennie had served as the president of the LCUC Dartmouth local. He continued to act in this capacity after C.U.P.W. became the bargaining agent -and while he held full-time office in C.U.P.W. - and apparently retains the presidency of the local to this day.

After his suspension from the full-time, paid C.U.P.W. job and just before he returned to work as a letter carrier, Mr. Glennie ran into Jeff Woods, president of C.U.P.W.'s Nova local, which encompasses Dartmouth and Halifax, and asked Mr. Woods if he could serve as shop steward for Dartmouth letter carriers. Mr. Woods agreed. So, on August 10 when Mr. Glennie went back into letter carrier service, he was also a shop steward.

At this point he began to hear the complaints about the July 31 incident. Mr. Glennie testified that, by August 14, he had "pieced together" what had happened. He then became convinced that the letter carriers had a legitimate grievance against Canada Post. Over the next two weeks, according to this testimony, he approached most of the 38 letter carriers, the 10 supervisory letter carriers and some term and casual employees who might have been filling in during July 31. His purpose, he told the Board, was to see who had been involved in the re-delivery incident, to talk to each such person individually about the extent of his or her extra work and to get signatures on a group grievance form. He said he "worked hard at pursuing these people." He was sick between August 16 and 18 and was unable to do any work on the case. On August 24, he discussed the matter with the supervisor at the "complaint stage" of the grievance process and there was no resolution. On August 28, he obtained the signatures of two more "grievors", one of whom had been away on vacation. He did not obtain the signatures of some six others who were also affected by the July 31 incident. The essence of the grievance was that the collective agreement had been violated by Canada Post in requiring the employees to deliver some additional mail on the morning portions of their walks and that they should be paid four hours' additional pay each.

Mr. Glennie testified that he had the day off on Wednesday, August 30, so he went first thing in the morning to the office of union president Woods to deliver the grievance and other documents. Mr. Woods had not arrived, but the next-door office was occupied by Gordon Ash, the Canadian Labour Congress National representative in Halifax. Mr. Glennie was able to gain access to Mr. Woods' office

through that of Mr. Ash.

Mr. Glennie told the Board that he put the grievance form on Mr. Woods' desk. He then stayed in the next-door office for a few moments' conversation with Mr. Ash. Almost immediately thereafter, Mr. Woods arrived. Mr. Glennie testified that he then told Mr. Woods he had brought in a grievance form. They discussed the grievance, including sections of the collective agreement that might apply. According to Mr. Glennie, the conversation was lengthy and he felt at the end of it that Mr. Woods fully understood the issue and the merits of the grievance. They discussed - according to Mr. Glennie - whether the grievance should be submitted as a group grievance or by the local itself on behalf of all the letter carriers. Mr. Glennie testified that Mr. Woods said he preferred the latter course; Mr. Woods gave no indication of needing further information or of wishing to investigate the matter himself before filing the grievance with the employer. Mr. Glennie told the Board that the conversation took about 15 minutes and that at the end Mr. Woods said he would file the grievance right away.

He said he had explained to Mr. Woods why it had taken him until August 30 to put the grievance together. He also reminded Mr. Woods that, to be within the time limits of the collective agreement, he (Mr. Woods) had to file the grievance by September 6. The practice in the union local is for grievances to be written up and submitted to the employer by the local president. Under the collective agreement, a grievance must be handed to C.P.C. not later than the 25th day after the occurrence which prompted it. September 6 was said to be the 25th working day after the July 31 incident.

Mr. Glennie testified he learned on September 11 that the grievance had not been submitted in time when he received a telephone call from Carol Woodhall, then secretary-treasurer of the local. Mr. Woods had gone to Toronto on September 8 to attend a national meeting of C.U.P.W. officials and she was substituting for him in the Halifax office. She was going through the accumulation of grievances and had found Mr. Glennie's. She was concerned about how the union would overcome the timeliness problem at that point and sought the advice of Mr. Glennie and of a senior C.U.P.W. official. She also approached Canada Post to determine whether any objection would be made by the employer to the timeliness of the grievance. In the end, however, the union did not formally file the grievance with Canada Post because, in response to these enquiries, the latter refused to waive the time limit and accept it.

III

During cross-examination, Mr. Glennie conceded that he could have given the grievance form to Mr. Woods or even raised the subject with him in conversation earlier in August - perhaps as early as August 14 - thereby giving him (Mr. Woods) more time to deal with the matter before the September 6 deadline. He did not have to interview every letter carrier and try to obtain the signatures of all before asking Mr. Woods to write up and file a grievance.

There was, in fact, a sharp difference between Mr. Glennie's testimony and that of Ms. Woodhall over whether Mr. Glennie did give Mr. Woods a document containing the signatures of the grieving letter carriers on August 30, along with the draft grievance itself or whether this did not arrive in Mr. Woods' office until later in September. Mr. Glennie insisted he gave it to Mr. Woods on August 30;

Ms. Woodhall insisted it arrived in the mail from Mr. Glennie at Mr. Woods' office on September 11. (Mr. Woods in his testimony could not recall seeing the document until much later.) It was date-stamped for that day and she testified she had put the stamp on the document on September 11. Moreover, the copy Mr. Glennie produced to the Board of the same document also carried the September 11 date stamp. The Board is inclined to accept Ms. Woodhall's version that C.U.P.W. did not have the signatures until September 11 as against that of Mr. Glennie; the point is only significant in that it supports the conclusion that Mr. Glennie did not have to secure signatures before filing the grievance - that he in fact did file it with Mr. Woods well before he provided the actual signatures and that his explanation that he had to delay filing the grievance until he had secured those signatures does not deserve much credence.

A matter of greater importance was an even sharper difference over the length of time Mr. Glennie and Mr. Woods spent in conversation about the grievance on August 30. Mr. Glennie told the Board he spent about 15 minutes and that, at the end, Mr. Woods could have been in no doubt about the nature of the grievance, nor about the fact there were only four or five days left in which to file it with Canada Post in a timely fashion. Gordon Ash, who has been identified earlier in these reasons as the Canadian Labour Congress National representative in Halifax and who has an office that opens into Mr. Woods' office, testified Mr. Glennie spent a maximum of two minutes with Mr. Woods. The latter, in his testimony, was somewhat more generous; he said the conversation could not have lasted more than five minutes. He asked Mr. Glennie what provisions of the collective agreement had been violated and he wrote these down on the grievance form. There was no discussion about

any time problem; he told the Board that after his brief encounter with Mr. Glennie he simply was not aware of a time problem. He added the grievance to a pile of several that were awaiting attention and did not look at any of them again before September 6.

The weight of the evidence, in the Board's opinion, tends to support a conclusion that the conversation was much shorter than Mr. Glennie's purported 15 minutes; it was probably in the two to five minute range, as estimated by Mr. Ash and Mr. Woods. We think it also highly probable that the timeliness problem did not really register with Mr. Woods at the time.

The testimony of both Mr. Woods and Mr. Ash was that at the time Mr. Glennie encountered Mr. woods and handed him the grievance, Mr. Woods was also making hasty, last-minute preparations for a Nova Scotia Federation of Labour Committee meeting. Both Mr. Woods and Mr. Ash were members of the committee and the meeting was about to start in a room down the hall almost immediately. The evidence suggests that at the time of his short session with Mr. Glennie, Mr. Woods was very much preoccupied with this meeting.

The Board heard considerable testimony concerning the circumstances of Mr. Woods' failure to deal with the grievance before September 6. Evidence was also adduced concerning Mr. Woods' own usual methods of dealing with grievances.

Since the collective agreement provides 25 working days between an incident and the filing of a grievance relating to that incident, which allows considerable leeway, Mr Woods does not work on grievances as he receives them. H

lets them pile up for several days and then processes them in periodic "binges", as he described them. Occasionally, he will accumulate as many as 30 grievances before working through all of them in one session. Both he and Ted Penney, C.U.P.W. regional grievance officer, testified that it is unusual for a steward to hand in a grievance as late as the 21st working day after the incident, as Mr. Glennie had done in this case. Normally, a grievance is brought forward by a steward within a couple of weeks at the outside and thus no particular attention has to be paid to the timeliness issue. Mr. Woods testified that up to August 30 he had last filed a package of grievances on August 21. Then no more were presented to the employer until September 11. Only the grievance in this case was out of time.

Mr. Woods' explanation for his failure to meet the September 6 deadline for submission of the grievance may be summarized as follows:

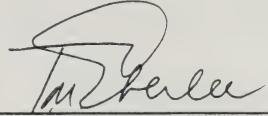
- Mr. Glennie was unusually slow in not submitting the grievance until the 21st day;
- the meeting with Mr. Glennie was short; he was preoccupied with his committee meeting; the fact that the grievance would be out of time by September 6 simply did not register in his mind;
- his practice was to let grievances pile up before processing them in a package;
- there were only three actual working days between Mr. Glennie's submission of the grievance to him and the deadline date; September 4, Labour Day, was a holiday;
- he was totally preoccupied on these three days with preparations for the meeting of the regional disciplinary committee on September 6, which he was

scheduled to chair, and at which Mr. Glennie and his colleagues who continued to support the Letter Carriers Union versus C.U.P.W. would be facing charges brought by the C.U.P.W. national executive board.

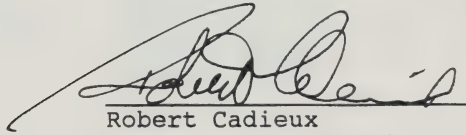
The Board finds his explanation to be reasonable. There is no evidence which could persuade the Board to conclude that Mr. Woods deliberately allowed the grievance to become untimely in order to punish or adversely affect Mr. Glennie, an avowed L.C.U.C. supporter, or anybody else who might be less than friendly toward C.U.P.W. Indeed, the slight suspicion arises that Mr. Woods and C.U.P.W. were more victims than perpetrators, in that Mr. Glennie could easily have given Mr. Woods the grievance many days before he did; by holding it back until almost the last minute (at a time when he knew Mr. Woods would be preoccupied with the regional disciplinary committee trial at which he (Mr. Glennie) would be appearing), Mr. Glennie ensured that its chances of being submitted to Canada Post by September 6 were as minimal as possible. Certainly the inordinate delay in its presentation to Mr. Woods was a significant factor in its becoming untimely.

The evidence does not show that Mr. Woods intended to handle this grievance in any way that was outside the norm. His "binge" system may not have been the best approach in the world, but it appears as a general rule to have worked acceptably. One cannot say that his handling of this grievance was incompetent or perfunctory or arbitrary or seriously negligent, as these concepts have been defined in Board jurisprudence. He simply made an honest mistake in failing to realize that he did not have as much time to deal with that particular grievance as he normally would have had.

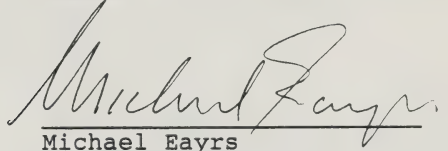
Under the circumstances, the Board cannot find that Mr. Woods and/or C.U.P.W. have violated Section 37. The complaint is therefore dismissed.



Thomas M. Eberlee
Vice-Chairman



Robert Cadieux
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 15th day of May 1990.

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Summary

CANADIAN UNION OF PUBLIC EMPLOYEES
(AIRLINE DIVISION), LOCAL 4027,
COMPLAINANT UNION, AND IBERIA,
AIRLINES OF SPAIN, RESPONDENT
EMPLOYER.

Board Files: 745-3302
745-3467

Decision no.: 796

Résumé de décision

SYNDICAT CANADIEN DE LA FONCTION
PUBLIQUE, DIVISION DU TRANSPORT
AÉRIEN, SECTION LOCALE 4027,
SYNDICAT PLAIGNANT, ET IBERIA,
LIGNES AÉRIENNES D'ESPAGNE,
EMPLOYEUR INTIMÉ.

Dossiers du Conseil: 745-3302
745-3467

Décision n°: 796

This case deals with two complaints. According to the complainant, the employer bargained in bad faith and refused to make every reasonable effort to enter into a collective agreement, in violation of section 50(a) of the Code. The parties are engaged in their first negotiations.

The employer raised several preliminary issues, in particular the time limit to file a complaint pursuant to section 50(a) of the Code and the admissibility of evidence regarding events that occurred before and after a complaint. The Board followed established jurisprudence. It confirmed that, in view of the continuous aspect of the bargaining process, a party can file a complaint of bad faith bargaining at any time during the process, subject to the Minister's consent pursuant to section 97(3) of the Code.

Le Conseil est saisi de deux plaintes alléguant que l'employeur a négocié de mauvaise foi et a refusé de faire tout effort raisonnable pour conclure une convention collective, le tout contrairement à l'alinéa 50a) du Code. Les parties en sont à leur première négociation collective.

L'employeur a soulevé plusieurs questions préliminaires dont celle du délai pour déposer une plainte en vertu de l'alinéa 50a) du Code et celle de l'admissibilité en preuve d'éléments portant sur des événements antérieurs ou postérieurs au dépôt d'une plainte. Le Conseil a suivi la jurisprudence établie et a confirmé que le processus de négociation, étant continu et ininterrompu, une plainte de négociation de mauvaise foi peut être déposée à n'importe quel moment du processus de négociation, sous réserve que le Ministre y ait consenti conformément au paragraphe 97(3) du Code.

According to the union, the employer bargained in bad faith by refusing at the bargaining table to offer to its unionized employees the same salary it was offering to non-unionized employees. And some of these employees belong to identical classifications. Had unionization not occurred, the union claims, the employer would have continued to offer the same conditions to all employees, including union members, in accordance with the policy on terms and conditions of employment at Iberia.

The Board allowed both complaints. In this case, evidence revealed that, by refusing for no valid reasons, business or other, to offer the same salary to all its employees, the employer had bargained in bad faith. The Board ordered the employer to submit a draft collective agreement to union members. This document should include the agreement on standard clauses and an offer of wage parity for all its employees.

Selon le syndicat, l'employeur négocié de mauvaise foi en refusant d'offrir à ses employés syndiqués à la table de négociation les mêmes conditions salariales que celle offertes au même moment aux employés non syndiqués, dont certains sont classifiés dans les mêmes catégories d'emploi que les employés syndiqués. Selon le syndicat, n'eût été la syndicalisation, l'employeur aurait continué à offrir aux employés de l'unité de négociation les mêmes conditions que celles offertes aux autres employés, conformément à la politique de détermination des conditions de travail en vigueur chez Iberia.

Le Conseil a accueilli les deux plaintes. Dans le cas présent, la preuve démontre que l'employeur, en refusant, sans aucun motif raisonnable et vraisemblable de nature économique ou autre, d'offrir à ses employés syndiqués la parité salariale avec les employés non syndiqués, a négocié de mauvaise foi. Le Conseil ordonne à l'employeur de soumettre aux employés syndiqués un projet de convention collective comprenant l'entente intervenue entre les parties sur les conditions normatives et une offre salariale établissant la parité entre les employés syndiqués et non syndiqués.

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Board

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Reasons for decision

Canadian Union of Public
Employees (Airline Division),
Local 4027,

complainant union,

and

Iberia Airlines of Spain,

respondent employer.

Board Files: 745-3302
745-3467

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Ginette Gosselin and Mr. Robert Cadieux, Members.

Appearances:

Mr. François Côté, for the Canadian Union of Public Employees, accompanied by Mr. Raymond Leclerc, union representative;

Mr. Serge Brassard, for Iberia Airlines of Spain, accompanied by Mr. José Ramon Romero, head of the international labour relations division.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair, with the assistance of the Members.

This decision deals with two complaints alleging violations of section 50(a) of the Canada Labour Code (Part I - Industrial Relations).

The Board decided to consolidate these two cases for the purposes of the decision, in view of the nature and chronology of the events that gave rise to these complaints and the evidence and arguments of the parties at the hearings.

(On this point see CJMS Radio Montréal Limitée et al. (1978), 27 di 796; and [1979] 1 Can LRBR 332 (CLRB no. 160), pages 799; and 335.)

I

The Proceedings

On July 25, 1989, the Minister of Labour consented to the union filing a complaint of bad faith bargaining against Iberia (the employer). The union was certified on September 15, 1987 to represent Iberia employees at its Montréal office. The bargaining unit is now composed of some 30 employees. A majority of them are classified as reservation and ticket agents or secretaries. Iberia also employs agents and secretaries at its Ottawa and Toronto offices, but those employees are not unionized. The employer also has management employees in each of its offices. This is the first time the parties have engaged in collective bargaining.

Section 50(a) of the Code reads as follows:

"50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; ..."

After the Minister gave his consent, the union formally filed a first complaint (file no. 745-3302) with the Board on August 28, 1989. The complainant alleges that the

respondent employer refused to give the employees in the bargaining unit the same salary increases that it gave to the firm's non-unionized employees; some of these employees belong to identical classifications. According to the union, this conduct at the bargaining table is bad faith and punitive in nature. Moreover, the offers in question are "discriminatory, since the only distinguishing factor between the two groups of employees is whether they belong to the union." The union is asking the Board to issue the following orders.

"1. Order the employer to cease all discrimination toward its unionized employees

2. Order that salary offers for unionized employees that are equivalent to those agreed to with non-unionized employees be tabled in respect of percentage increases in salary levels

3. Issue such other orders to ensure that the objectives set out in section 50(a) are achieved as it may deem just in the circumstances"

(translation)

The union states that it received the employer's last salary offer on April 12, 1989.

The employer denies all allegations that it violated section 50(a) of the Code. We shall consider later the parties' arguments in support of their respective arguments. This is the first complaint.

The Board had already set a date to hear the parties in file no. 745-3302, when the complainant union sent a new request for consent to the Minister of Labour on November 3, 1989, seeking to file another complaint alleging violation of section 50(a) of the Code. The Minister gave his consent on December 8, 1989, while on December 4, 1989 the Board had already begun the hearings into the first complaint. This second complaint (file no. 745-3467) was filed with the

Board on November 3, 1989, at the same time as the request was made to the Minister.

The complainant alleges that the respondent employer contravened section 50(a) of the Code by refusing in August 1989 to continue collective bargaining if the union did not withdraw its complaint of bad faith bargaining, that is, the first complaint (file no. 745-3302). Moreover, the union alleges that since July 27, 1989 the employer "continues to refuse to bargain in good faith for the same reasons as those set out" in the first complaint. Accordingly, the complainant asks the Board to issue the following orders.

"ORDER that the respondent employer cease all discriminatory practices toward its employees

Specifically, that it cease to make resumption of bargaining conditional on the union withdrawing its proceedings before the Board

ORDER that salary offers equivalent to those given to non-unionized employees be tabled

ISSUE such other orders as will ensure that the objectives set out in section 50(a) are achieved as it deems just in the circumstances"

(translation)

As in the case of the first complaint, the employer denies having contravened the provisions of the Code.

The Board heard the parties on December 4, 14 and 15, 1989, January 4 and 5, 1990 and February 26 and 27, 1990.

II

Preliminary Issues

The employer raised preliminary issues in both files. The Board took these under advisement and heard the evidence. We shall now deal with these issues.

A. First Complaint: file no. 745-3302

In its written reply, the employer first argued that this complaint, which was formally filed with the Board on August 28, 1989, was untimely and that it therefore must be dismissed.

At the hearing it further opposed a request made by the complainant union to amend the complaint.

1. Untimeliness of the Complaint

The employer argues that the complaint filed with the Board on August 28, 1989 is untimely since the complaint or the circumstances giving rise to it, that is, the salary offer made at the bargaining table on the night of April 13, 1989, had arisen more than 90 days before August 28, 1989.

Moreover, since the Board cannot vary the 90-day time limit stipulated in section 97(2) of the Code, as the Supreme Court decided in Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902, the complaint is untimely and must be dismissed.

Section 97 of the Code provides:

"97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94 or 95; or

(b) any person has failed to comply with section 96.

(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the

action or circumstances giving rise to the complaint.

(3) Except with the consent of the Minister, no complaint shall be made to the Board under subsection (1) in respect of an alleged failure to comply with section 50 or paragraph 94(3)(g) or 95(a) or (b)."

This objection of untimeliness raises the issue of the nature of the duty to bargain in good faith and, incidentally, the admissibility in evidence of facts that arise before or after the complaint is filed.

The duty to bargain in good faith has long been considered to be a duty of a continuous nature. In CKLW Radio Broadcasting Limited (1977), 23 di 51; and 77 CLLC 16,110 (CLRB no. 101), the Board outlined the following:

"... The duty to bargain in good faith and make every reasonable effort is a continuous duty from when notice to bargain is given until a final resolution of an agreement. It survives the intervention of a work stoppage, although the character of the duty may change. It also survives a complaint of failure to bargain in good faith. Of course, the existence of the complaint may make it very difficult for the parties to meet face to face on their own.

...

... An appraisal of the entire statutory scheme makes it obvious that the duty to bargain in good faith is a continuous one and that it is not contemplated that the Board will consider isolated events out of the context of the ongoing duty. It is even more obvious that a request for ministerial consent or a complaint is not intended to terminate the duty. It was for these reasons that we overruled the employer's preliminary objection that we could not hear evidence of events subsequent to the granting of ministerial consent. Before leaving these general comments we wish to reiterate that the character of the duty may alter after a request for consent is made, as it does after the commencement of a strike. The extent to which it alters will depend on the facts of each case. ..."

(pages 89-90; and 713-714)

The continuous and ongoing nature of the duty to bargain in good faith therefore gives the Board authority, in hearing a complaint, to examine the entire collective bargaining

process and to hear evidence of all facts that are relevant to such bargaining, at whatever time these facts may have arisen. The Board has recognized and applied these rules consistently since the case referred to above. (See Eastern Provincial Airways Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRB no. 448); Peter G. Reynolds et al. (1987), 68 di 116; and 87 CLLC 16,011 (CLRB no. 607); Nordair Ltd. (1985), 60 di 55; and 85 CLLC 16,023 (CLRB no. 500); Radio CHNC Limitée, New Carlisle, Quebec (1984), 55 di 61 (CLRB no. 450); Northern Telecom Canada Limited (1980), 42 di 178; and [1981] 1 Can LRBR 306 (CLRB no. 281); Allan Martin et al. (1979), 37 di 50; [1979] 2 Can LRBR 184; and 80 CLLC 16,004 (CLRB no. 203); Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574); General Aviation Services Ltd. (1982), 51 di 71; [1982] 3 Can LRBR 47; and 82 CLLC 16,177 (CLRB no. 385).)

The nature of the duty to bargain in good faith determines the method of calculating the time limit for filing a complaint with the Board. Thus, since the duty to bargain in good faith is a continuous duty, that is, it is uninterrupted from the time the notice to bargain is given to the other party, it follows that the party alleging that this duty has been violated may file a complaint with the Board at any time during the period of the collective bargaining process.

This aspect of the question was considered by the Board in Brewster Transport Company Limited, supra, and by the Federal Court of Appeal in Eastern Provincial Airways Limited v. Canada Labour Relations Board et al., [1984] 1 F.C. 732; (1983), 2 D.L.R. (4th) 597; and 50 N.R. 81.

In Brewster Transport Company Limited, supra, the employer alleged that the ministerial consent was invalid since it did not contain any time limit, and simply referred to the events that had occurred after the notice to bargain was given. Under section 97(2), a complaint must be filed not later than 90 days after the action or circumstance giving rise to the complaint; according to the employer, the complaint could deal only with events that had occurred in the 90 days preceding the ministerial consent and the complaint.

The Board rejected this argument and examined the facts that had occurred more than 90 days before the Minister's consent was given and the complaint filed. On this point, the Board stated:

"Mr. Meurin's [counsel for the employer] argument is based on the premise that section 148(a) [50(a)] complaints are in respect of discrete events, and therefore timeliness must be measured in terms of discrete events. We think this approach misconstrues the nature of the duty to bargain in good faith under section 148(a). Complaints under section 148(a) relate to a course of conduct, rather than to discrete events as such. ...

...

Since a complaint alleging failure to bargain in good faith deals with a course of conduct, the 90-day time limit for a complaint about the entire course of conduct starts to run only at the end of the course of conduct. Since we have found the course of conduct to be ongoing and still continuing, there is no timeliness problem.

Any other approach would be unworkable. Complainants would have to keep filing new complaints as events unfolded, which would entail new consents from the Minister. Complainants would risk having the earlier aspect of their complaint as time barred while the Minister was investigating whether it was advisable to grant consent, something over which the complainant has no control. Section 187(2) [97(2)] is designed to prevent complainants from being deleterious about pursuing their rights once the conduct being complained of has terminated. It is not designed to promote multiple applications, nor to frustrate a complainant awaiting Ministerial consent, nor to protect a respondent who is continuing to act in an ongoing pattern of illegal conduct."

(pages 35-36; 374-375; and 14,383-14,384)

In this case, the Board relied on the judgment of the Federal Court of Appeal in Eastern Provincial Airways Limited, *supra*. In that case, the Court confirmed that the subject matter of a section 50(a) complaint was by its very nature an ongoing matter, that is, the collective bargaining process is of an ongoing nature. The Court further stated that the Board has jurisdiction to hear evidence of facts subsequent to the filing of the complaint. The Court stated:

"... Among the things which the Board found to have been unfair labour practices was EPA's addition to the proposed collective agreement, on April 4, 1983, of a new proposal for a third year at 5% when, theretofore, a 2-year term had been the basis of negotiation. The CALPA complaints were dated March 7, a month before the introduction of the third year by EPA. It is, nevertheless, a manifestation of the alleged failure to bargain in good faith as required by section 148. The preamble to the Canada Labour Code [S.C. 1972, c. 18] recites Parliament's intention.

'And Whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;'

That intention to develop good relations between labour and management would not be served by limiting the Board, once seized of a complaint, to consideration of incidents recited in the complaint or antedating it when its subject-matter is, by its nature, ongoing, as here. I find no support for EPA's position in the requirement, by subsection 187(5), of Ministerial consent nor in the consent itself (Case, page 217)."

(pages 741-742; 603; and 84-85)

With respect to the admissibility in evidence of facts post-dating the consent of the Minister, the Board had already adopted a similar position. (See CKLW Radio Broadcasting Limited, *supra*, pages 90; and 714, and Northern Telecom Canada Limited (1980), 42 di 178; and [1981] Can LRBR 306 (CLRB no. 281).)

In the case at bar, it is established that the bargaining process began in November 1987 and continued throughout 1988 and into 1989. The facts reveal that the last meeting between the parties took place on April 13, 1989. When the hearings ended on February 27, 1990, no collective agreement had been signed. The Board has no doubt that on April 27, 1989, the date when the union made its first request for ministerial consent, the collective bargaining process had not terminated. After the bargaining round in April 1989, the union believed that the employer was guilty of bad faith bargaining. It so advised the Minister and asked him to authorize it to bring proceedings against the employer for violating section 50(a). This request to the Minister and the reference to a particular incident, inter alia, that is, the salary offer of April 13, 1989, do not mark the end of collective bargaining.

The events described in the request for consent and in the complaint filed with the Board refer to an attitude and course of conduct that existed before April 13, 1989 and that persisted until and after that date.

The fact that the request was made to the Minister at a point that one party considered appropriate does not in itself operate so as to terminate the collective bargaining process, or to conclude that the duty to bargain has ended. On the contrary, the Board has established that this duty subsists even after a request for consent is made, even after a complaint is filed and even after the right to strike has been obtained and exercised. (See CKLW Radio Broadcasting Limited, supra, pages 89; and 713.)

In this case, the Board is satisfied that the period of collective bargaining which was intended to result in the signing of a first collective agreement was underway when the first complaint was filed on August 28, 1989. The Minister of Labour authorized the filing of this first complaint in accordance with section 97(3); the complaint met all the requirements of the Code. Accordingly, the objection that the first complaint is untimely is dismissed.

At the hearing, the employer also objected to a document dated June 30, 1989 being admitted in evidence; this document sets out the conditions of employment including the salary of non-unionized employees of the employer in Canada for the period from May 1, 1989 to April 30, 1990. The basis for this objection is that this document refers to events occurring subsequent to April 13, 1989. The Federal Court of Appeal, in Eastern Provincial Airways Limited, supra, and the Board in CKLW Radio Broadcasting Limited, supra, have already decided the issue of the admissibility in evidence of facts post-dating the consent or the filing of the complaint. This objection is dismissed and the June 30, 1989 document is admitted in evidence.

2. The Request to Amend the Complaint

The request for consent made to the Minister of Labour and the complaint filed with the Board contain identical allegations. Item 13, which refers to the allegedly discriminatory nature of the salary offers, states:

"Such discrimination is unlawful under the Charter of Rights and Freedoms."

(translation)

At the hearing, the union moved to amend this statement to read as follows:

"Such discrimination is unlawful under section 8(1) of the Canada Labour Code."

(translation)

This request to amend is intended to substitute one legal argument for another. The employer objected to this request being allowed, on the ground that once the Minister gives his consent, the Board cannot permit an amendment since the Minister did not consider it.

The fact that the Minister did not consider this allegation when the request for consent was made does not in itself prevent the Board from hearing it; the Board must decide in each individual case whether a request may be allowed. The Board is seized with a duly authorized complaint and is master of its own proceedings, and may allow a request for amendment if it believes that such request meets the generally accepted conditions for allowing such requests. In the case at bar, if the amendment is made, the result would not be an entirely new request bearing no relation to the subject matter of the complaint. The reference to the provisions of section 8(1) of the Code, which guarantees the freedom of an employee to join the union of his or her choice and to participate in lawful union activities, in the context of a complaint under section 50(a) of the Code, appears to be neither irrelevant nor contrary to the interests of justice. This amendment does not operate to vitiate or to alter the ministerial consent. The request for amendment is therefore allowed.

The employer further argues that the amendment is improper because, in its view, the time limits set out in section 35 of the Board's Regulations do not apply. The employer did not allege that it would suffer any prejudice whatsoever if the amendment were made, and it did not request time to

permit it to react to the situation which would result from the amendment. This argument is rejected.

Finally, the employer submits that if the amendment is made the union cannot argue, in the context of a section 50(a) complaint, that the employer has interfered in the exercise of the individual rights conferred on employees, and not on the union, by section 8(1) of the Code. If the union were to argue this, the employer says, it would be pleading someone else's case. The union argues that its exclusive right to bargain collectively on behalf of the employees in the bargaining unit, as provided in section 38(1) of the Code, is endangered by the conduct of the employer at the bargaining table. It argues, inter alia, that the nature of the salary offers amounts in this case to an infringement on or hindrance to the employees fully exercising the right freely to join a union and participate in its lawful activities. A collective agreement is designed first and foremost to determine the employees' conditions of employment, and the union, which is a party to the agreement under section 48 of the Code and is the exclusive agent designated to negotiate the agreement, may certainly argue in law that the employer's attitude at the bargaining table prevents the employees from fully exercising, in this instance, the rights provided in section 8(1) of the Code. In the Board's opinion, if this fact is proved, it may be an element to be considered in determining the employer's good or bad faith in the context of a section 50(a) complaint. This argument is rejected.

B. Second Complaint: file no. 745-3467

At the hearing, the Board informed the parties that the evidence heard in the first complaint would be added to the file of the second complaint, to the extent that such

evidence appeared to be relevant in deciding the second matter.

At the beginning of the hearing in file no. 745-3467, the employer made two preliminary motions. The first seeks to strike certain allegations and conclusions in the complaint; the second suggests that the evidence heard in the first complaint dealing with these allegations not be added to the file of this case.

1. The Request to Strike Allegations and Conclusions

The second complaint accuses the employer of having contravened section 50(a) of the Code when it refused, in August 1989, to continue collective bargaining if the union did not withdraw its first complaint.

The employer asks first that the allegations concerning the facts already presented in support of the first complaint be stricken. In the view of the employer, such allegations are not relevant, necessary or useful for deciding the second complaint and, further, they are already the subject of the first complaint.

In order to decide this question, let us recall that the bargaining process, which is continuous and uninterrupted from the notice to bargain until a collective agreement is signed, means that the duty to bargain persists even after a complaint of bad faith bargaining is filed; the Board may hear evidence of all relevant facts, both before and after this complaint. The Board has already decided, basing its decision on this rule, that a second complaint, accompanied by a second ministerial consent, was not necessary if one party wished to raise a new fact that had occurred after a first complaint was filed. (See Northern Telecom Canada

Limited (1980), 42 di 178; and [1981] 1 Can LRBR 306 (CLRB no. 281), pages 190; and 315.)

If we apply this rule to the present case, the result is that the Board would in any event have admitted in evidence, in respect of the first complaint, facts relating to the employer's alleged refusal to bargain, which was the subject of the second complaint. However, the Board is seized of this second complaint and must dispose of it. The Board therefore finds that the statements which it is sought to strike provide an understanding of the meaning and scope of the complaint and place the alleged violation of the Code in the overall context of the bargaining. Because in deciding section 50(a) complaints the entire bargaining process must be examined, these allegations, which perhaps appear redundant on the surface, are however neither superfluous nor pointless. This first request is dismissed.

The employer also seeks to have certain conclusions stricken. It alleges that since they are identical to those in the first complaint, except for the second part of the first conclusion (see pages 2 and 3 of this decision) they should be stricken, because they could result in double sentencing.

In theory, this argument may appear correct, but in concrete terms it is of no effect. If the Board does decide to allow both complaints and issue orders in accordance with the conclusions sought, it will not issue two identical orders. In such a situation the Board would show some judgement. However, in order to deal formally with the question, the Board allows the request to strike certain conclusions, leaving the following conclusion:

"Order that the employer cease to make resumption of bargaining conditional on the union withdrawing its proceedings before the Board"

(translation)

noting, however, that it is not bound by the wording of the request for an order.

2. Entering Evidence

Given the comments and conclusions on the request to strike allegations, all evidence found in the file of the first complaint is added to the file of the second complaint.

III

The Evidence

The Board heard detailed evidence on the manner in which collective bargaining had unfolded and on the various discussions between the parties. There was no contradictory evidence on the facts that are relevant and essential to reach a decision on the two complaints, although the parties' analysis of some evidence varied.

1. Determination of Conditions of Employment at Iberia

At the time the union was certified, there was a well-established system at Iberia for determining conditions of employment, which system applied to all employees. This system is still in effect for non-unionized staff. According to this method, general management in Madrid consults with management staff in Canada and then sets conditions of employment for Canadian employees. These conditions are set out in a document entitled "Internal Management Regulations - Canada Delegation" which is made

available to employees. All aspects of the conditions of employment are dealt with in this document: management rights, personnel classification, rules on hiring and promotion, work schedules, overtime, leaves and vacation, group insurance and pension plans, and so on. Every year Iberia reviews its employees' conditions of employment and changes them when it considers it necessary. A committee of three employees established by Iberia is responsible for presenting to management the changes sought by the Canadian employees.

Salaries are not included in the above-mentioned document. They are amended annually, and published in separate documents. Thus in 1986 and 1987 Iberia gave all its employees a 6% salary increase, effective on May 1 of each year. On May 1, 1988 and May 1, 1989, Iberia increased the non-unionized staff's salary scales by 5%.

When bargaining commenced, the salary structure in effect at Iberia was divided into six job classifications, each having a salary scale of 16 increments. A majority of the employees covered by the certificate were in job classifications II, III and IV. For example, an employee occupying a secretarial position in Montréal, Toronto or elsewhere, whether or not the employee was unionized, receives the salary for job classification III. There are also some unionized employees in classification V. Promotion of an employee to a higher classification or advancement within the salary scale for his or her job classification is entirely at the discretion of management.

2. The Manner in Which Bargaining Unfolded

Bargaining started in November 1987 with the tabling of the union's proposals, except for salary demands.

At the first meeting, the union asked the employer to provide it with information that would allow it to prepare its salary demands. It obtained some of this information in the summer of 1988: a list of employees, showing their position in the salary scale and their job descriptions. Also at that meeting there was a discussion, as is normal in these cases, of the manner in which negotiations would be structured: the make-up of labour-management committees, the place and schedule for meetings, authorization for union representatives (Iberia employees) to participate in bargaining sessions.

The union also suggested that two other questions be discussed. The first related to the dismissal of a member of the bargaining unit who had earlier testified before the Board. The second related to the union's request that the personnel manager, A.F. Montaña, be replaced. The employees held him responsible for serious disputes that had occurred between management and employees during the union organizing campaign and throughout the entire certification period. This period was actually quite difficult, as witness the Board's decisions, to which we shall return. The employer categorically refused to discuss these two questions. The union took the first case to the Board which, in a decision dated June 23, 1988, reinstated the employee who had been dismissed. The "Montaña matter" was put aside.

There were 27 bargaining meetings between November 1987 and April 1989. At the end of January 1988 bargaining broke off, because the parties could not agree on the language to be used at meetings and in documents. The union then requested conciliation pursuant to section 71 of the Code.

Bargaining resumed in May 1988 at the invitation of the conciliator, and continued more or less normally until December 1988, but without any really significant result. In mid-December the employer, in response to the conciliator's request encouraging it to complete its offers, submitted an offer it described as "final and all-inclusive."

This offer included the standard clauses on which the parties had already agreed, proposed new provisions on outstanding standard clauses and set out a salary proposal. We shall return to the content of this salary proposal.

At the end of December 1988, the union's general assembly rejected this "final and all-inclusive" offer on the recommendation of the bargaining committee. It decided at that time to request that a conciliation commissioner be appointed pursuant to section 74 of the Code, since the conciliator in the case had indicated his intention to report to the Minister. The Minister did not grant the union's request, and the union then asked the conciliator to attempt special mediation. Iberia accepted the conciliator's invitation, and the parties met again on April 10, 11, 12 and 13 in the presence of the conciliator. At that time, the entire question of salaries and a large number of standard clauses were outstanding.

During the April 1989 sessions, the parties agreed on all the standard clauses. The parties' agreement on these clauses was laid out in a document prepared by the management representative at the bargaining table. This document, a draft collective agreement between Iberia Airlines of Spain and Canadian Union of Public Employees, Local 4027, dated April 13, 1989, was presented to the Board by the employer (Exhibit 11(c)). The union became aware of

this document when it was filed with the Board in November 1989. During the hearing, the union president indicated that this document reflected the agreement between the parties, except for schedule B, dealing with salary increases and increments, since that schedule consisted of the text of the last salary offer submitted to the union on April 13, 1989 and rejected by the general assembly shortly thereafter.

The Board examined this agreement. It appears that, apart from the provisions dealing with grievances and arbitration, which are compulsory under section 57 of the Code, as well as with acquiring, maintaining and accumulating seniority, the agreement largely reproduces the conditions of employment already in effect at Iberia and set out in the document entitled "Internal Management Regulations - Canada Delegation." From all appearances, the union has withdrawn several of its standard clause demands. However, some improvements appear to have been introduced. For example, under vacations, employees with five and six years of service would receive 21 days vacation in 1990 instead of 18. Vacation time for employees with nine years of service would go from 22 to 23 days per year. There is also an increase of \$5 to \$7 in meal allowances on overtime, and an increase in the number of days of leave without loss of salary (marriage, death and so on). Part-time employees also gain, and they now have the same rights as full-time employees.

While the union is not boasting about this agreement, nor is it complaining. The employer, for its part, claims to have made concessions in this agreement that would explain its salary offers, about which we shall have more to say later. Despite this progress in terms of standard clauses, which brought the parties to a consensus, the evidence

showed that the salary issue was entirely unresolved on the afternoon of April 12, 1989, when the parties began their consideration of this issue.

3. Developments in Salary Negotiations

When salary negotiations started in September 1988, non-unionized staff had received a 5% salary increase as of May 1, 1988, under the system for determining conditions of employment then in effect at Iberia. This increase was not given to unionized staff.

(a) Union Demands

The union presented its salary demands on September 1, 1988. It wanted a two-year collective agreement with an annual increase of 10% and automatic advancement of one increment every six months within the salary scale. The union also proposed that a joint committee be established to develop a promotion clause for the next round of bargaining.

When it presented its salary demands, the union stated that the advancement and promotion issues were a priority: its members did not want to be subject any longer to what seemed to them to be an arbitrary management system and wanted to put an end to situations where two people in different job classifications with different salaries were doing the same jobs.

(b) Management Offers

The First Offer: September 1988

In mid-September, two weeks after the union presented its demands, Iberia replied by presenting its first salary offer. It was offering a one-year collective agreement, starting on the date it was signed, with a 3% salary increase. This proposal included a request to increase the unionized employees' contributions to the pension plan in place at Iberia, so that the employee contribution would be proportionate to the employer contribution. These costs were to be divided as before for non-unionized employees, that is, 4% for the employee and 11% for the employer.

This offer did not respond to either the demand for automatic advancement within the scale or the demand regarding promotions. The union rejected this offer at the next session and the parties agreed to set the salary issue aside and return to it once the standard clauses were settled.

The Second Offer: December 1988

The main characteristics of the salary offer set out in the "final and all-inclusive" offer of December 16, 1988 were as follows.

1. The employer offered a two-year collective agreement starting on the date it was signed.
2. It offered .3% annual salary increases with quarterly increases of 1%, until the maximum salary then applicable to each job classification was reached, that

is, the May 1, 1987 salary scales, the 5% increase of May 1, 1988 not having been given to unionized staff.

3. It would pay to each employee a lump sum of \$600, \$650 or \$800, depending on whether he or she was in job classification II, III or IV (now A, B and C). This amount was intended to compensate for the unionized employees' lost earnings between May 1, 1988 and the date of signing, after the general increase of May 1, 1988.
4. It withdrew the demand to increase the employees' contribution to the pension plan.

The union representatives, who considered this offer lower than the increases given unilaterally in May 1988 to non-unionized staff, described it as ridiculous. They then informed their management counterparts that an offer giving unionized employees lower salary increases than those given to non-unionized employees was unacceptable.

The Third Offer: April 1989

When bargaining resumed in the presence of the conciliator, on April 10, 11, 12 and 13, 1989, José Ramon Romero, head of Iberia's international labour relations division, and Richard Nolan, president of the Airline Division of the Canadian Union of Public Employees, were present.

After finalizing bargaining on the standard clauses on the afternoon of April 12, 1989, the parties then opened the salary discussion. A number of proposals were exchanged at that time. For purposes of this case, two aspects are of interest.

First, the union approached the promotions issue differently. Its proposal to create a joint committee had never been accepted by the employer. The union then realized, from Mr. Romero's comments on this subject, that there were no formal and explicit criteria governing promotions. It therefore proposed an automatic promotion formula: every five years, an employee in classification A would move to classification B, and every seven years, from classification B to classification C.

The final management offer submitted on the night of April 13, 1989 contained the following.

1. The employer offered a two-year collective agreement starting on the date it was signed, retroactive to January 1, 1989 in respect of salaries.
2. It would pay a lump sum of \$650, \$725 or \$900, depending on job classification. This sum was intended to compensate for lost earnings for 1988, since no salary increase had been given to unionized employees.
3. It would award on January 1, 1989 an increase of 4% in the existing salary scale, the scale in effect since May 1, 1987.
4. It would award a salary increase for each unionized employee of about 4.5% on January 1, 1990. According to Iberia's offer, this individual 4.5% salary increase included both automatic advancement to a level within the salary scale and a slight increase in the increments in the salary scale. The Board's calculations show that the real rate of increase in the salary scale for 1990 varies from 0.5% to 2%, if we remove the portion of the increase attributable to automatic advancement in increments.

5. It provided for automatic promotion from classification A to classification B after five years work with Iberia and the possibility of a promotion from classification B to classification C after ten years, subject to a favourable evaluation by the employer in the latter case. Iberia stated that it had made a major concession on this point respecting automatic advancement and promotion, and that this concession explained the gap between the salary given to unionized and non-unionized employees.

The union representatives at the bargaining table rejected this offer. They were agreeable to accepting a lump sum payment to replace the salary scale increase given to non-unionized employees on May 1, 1988, but on condition that subsequent increases compensate for the salary gap created by this lump sum payment. They believed that partial attainment of the objectives of automatic advancement and promotion did not justify maintaining a gap in the long term between the salaries of unionized and non-unionized employees. The union also feared that the salary increase to be given, as usual, to non-unionized employees in May 1989 would further enlarge the salary gap. Moreover, automatic advancement by one increment in 1990 was not an advantage, since the employer had considerably reduced the rate of increase in the salary scale in order to do this.

In mid-April 1989 the union's general assembly rejected the agreement on the standard clauses and the latest salary offer as a whole. It decided to seek the consent of the Minister of Labour to file a complaint of bad faith bargaining, and consent was requested on April 27, 1989. The Minister granted consent on July 25, 1989.

4. Post-April 1989

Meanwhile, on July 30, 1989, Iberia increased its non-unionized employees' salary scale by 5%, retroactive to May 1, 1989. This increase added to the gap that existed between the salary scales for unionized and non-unionized employees when the management proposal was rejected in April.

At the same time, the employer "exceptionally" gave non-unionized employees a \$500 bonus. It also gave these employees further benefits to apply starting in 1989. For example, employees with more than 10 and 15 years of service were given one additional day of vacation; meal allowances on overtime were increased to \$8; and the improvement in the number of days of leave without loss of salary negotiated with the union in April 1989 was applied to non-unionized staff. Finally, the annual cash reimbursement for accumulated sick leave was raised from 50% to 75% for employees with a maximum reserve of such leave to their credit.

In August 1989, believing that the consent of the Minister to filing a complaint of bad faith bargaining would have brought some change in the employer's position, the union representative, in a telephone conversation with his management counterpart, told him that the union wanted to set a date for a bargaining meeting, explaining that the union wanted to obtain the same rate of increase in the 1989 salary scale as the company had just given to non-unionized employees.

Iberia then refused to resume bargaining. First, it did not want to bargain under the pressure of a complaint, and the union refused to withdraw it as the employer was asking.

However, there was more. Iberia management believed that it would be pointless to resume bargaining. The employer knew that the union wanted wage parity with non-unionized employees, and it was not about to grant this. It decided to leave the matter in the hands of the Board. As a result of this refusal to bargain the union commenced proceedings which led to the filing of the second complaint.

5. The Employer's Bargaining Objectives

José Ramon Romero, head of Iberia's international labour relations division since January 1, 1988, is responsible for labour relations and personnel management for the company's foreign operations, which account for 3000 employees in 50 countries. In this capacity, he personally assumed full and ultimate responsibility as of January 1, 1988 for bargaining for the group of unionized employees at the Canadian headquarters in Montréal. He laid out the framework, principles and objectives of these negotiations and gave the appropriate mandates to his representatives. He was familiar with management proposals and he authorized presentation and alteration of these proposals. Mr. Romero explained his approach and bargaining objectives for Montréal to the Board, and presented his analysis of the situation.

He stated that Iberia's economic situation in 1988 and 1989 was not a criterion or factor in determining the non-unionized employees' conditions of employment, nor an issue in bargaining with unionized employees: Iberia's ability to pay was not in question; the employer's concerns were different.

In the context of this collective bargaining, Mr. Romero was concerned about two main factors. First, his objective was

to have a situation of balance between the unionized and non-unionized groups, given, inter alia, that there were employees in the same classification in each group. The goal was not necessarily to offer identical economic conditions to both groups, but to find what he called a point of equilibrium. Also on this subject, he firmly believed that he had found this balance in April 1989 when he agreed, despite his disagreement in principle, to what the union called its priority demand, that is, automatic increment advancement and automatic promotion for one of the job classifications. On the other hand, while making these concessions to the union, Mr. Romero had to consider another bargaining objective, that is, the psychological impact of the terms of the collective agreement on non-unionized employees, including the automatic nature ascribed to salary increments and promotion. In addition to the psychological impact there were the hidden costs of such an undertaking, if it were to spread throughout the firm. In his eyes, all these factors explained and justified the terms of the salary offer of April 13, 1989. He further stated that he had been very surprised by the union's unfavourable reaction on a fundamental aspect, even though the final and overall result was lower in respect of salary than for the non-unionized group.

Mr. Romero did not provide any specific justification for the terms of the offers of September 1988 and December 1988 which, let us recall, were lower than what was given to non-unionized employees in May 1988 and did not include the advantage of automatic advancement and promotion. In his view, the terms of these offers were neither decisive nor conclusive, since the important thing is to bargain and reach an agreement; the various discussions and proposals at the bargaining table must not be considered or assessed in isolation. The important thing is to attain the set

goal, with little regard really for the means, the time needed and the path taken to do so.

Finally, Mr. Romero clearly stated that the conditions of employment for non-unionized staff for the year 1989-90 were not determined on the basis of, or even influenced by, the collective bargaining then underway. He added that the standard clauses on which there was agreement in principle between the employer and the union on April 12, 1989 were also not taken into consideration in establishing conditions for non-unionized staff.

IV

The Positions of the Parties

1. The Complainant

The complainant union argues that throughout the bargaining period in question, from November 1987 to April 1989, the employer maintained an unwarranted distinction between unionized and non-unionized staff in respect of salaries, which constitutes in the circumstances a violation of section 50(a) of the Code.

The union submits that the employer's attitude must be examined in a general manner, taking into account the manner in which the collective bargaining unfolded and the overall context of unionization at this employer's firm. Bad faith is a question of fact to be determined in each case.

More specifically, the union submits that the employer was only engaged in surface bargaining. In fact, even though this employer appeared regularly at the bargaining table, the manner in which it bargained and, in particular, the

manner in which it presented its salary offers could only result in an impasse. The union takes the position that these offers created an imbalance between employees in the same classification, for which the employer was never able to give a valid reason, business or other. These offers put unionized employees in a general position of inferiority with respect to conditions of employment, since on the standard clauses the union had agreed almost entirely to the system in effect for all other employees. In this case, the insistence on establishing a lower salary scheme amounted to bad faith bargaining and cannot be considered a reasonable effort to enter into a collective agreement.

The union argues that the employer in this case was trying to bargain the union's very existence, since whatever position the union took in respect of the employer's salary offers it would be futile.

Finally, the complainant union submits that the employer's record during the union organizing period and the fact that it had previously been criticized by the Board are significant and exacerbating factors.

2. The Respondent

The respondent employer argues that there can be no unlawfulness in the mere act of making salary proposals to its unionized employees that were lower than the salary offered to another group. The existence of different criteria for determining conditions of employment, depending on the group of employees in question and with a view to achieving a balance between the two groups, cannot in itself amount to a violation of the Code.

The fact that the employer was seeking to enter into the best possible collective agreement, knowing that it would have to give unionized employees a role in managing the firm, and taking into account the possible impact of the results of the bargaining on the other employees, does not amount to bad faith bargaining. Moreover, the fact, inter alia, that the employer agreed in April 1989 to the union demand for automatic advancement by increments and automatic promotion from classification A to classification B in the final year of the collective agreement (1990) was a fundamental concession by the employer and met an essential bargaining objective for the union. This approach, like the conduct generally adopted by the employer in this case, including 200 hours at the bargaining table, cannot be considered surface bargaining.

The employer did not bring the bargaining to an impasse, as the complainant submits. Rather, the complainant did so, by inflexibly demanding wage parity between unionized and non-unionized employees.

The employer submits that the union is faced with a bargaining situation it cannot resolve to its satisfaction, and it is asking a third party to intervene to solve its problem. This kind of situation can arise in bargaining and the law provides that an economic sanction, i.e. a strike, is the appropriate recourse. The union did not see fit to strike. That does not mean that the employer has violated the Code and does not justify intervention by the Board to solve the union's problem of its weakness at the bargaining table.

The Law

1. The Role of the Board

The purpose of collective bargaining, which begins once the bargaining agent is certified, is to enter into and sign a collective agreement. The legal rules governing the certification and collective bargaining processes are designed to establish conditions that will promote the realization of this objective, the primary objective of employees who exercise their right to join a union and participate in its lawful activities as provided in section 8(1) of the Code.

Parliament imposed an obligation on union and management to bargain in good faith and to make every reasonable effort to enter into a collective agreement (section 50(a) of the Code). The law provides the parties with a mechanism to assist them in collective bargaining: conciliation. The Minister of Labour is responsible for implementing the various methods in which conciliation may operate; he decides whether intervention by a third party is advisable. Once the various conciliation steps have been exhausted, the law gives the parties the right, in certain circumstances, to use economic sanctions: strikes or lockouts. At no point do the rules of collective bargaining require that the parties submit to intervention and decision by a third party: free collective bargaining is the rule.

Parliament provided two exceptions to this rule. The first is the imposition of a first collective agreement by the Board (section 80 of the Code); the second is examination by the Board of the parties' conduct in collective

bargaining in terms of whether there is good faith bargaining and whether there have been reasonable efforts (section 50(a) of the Code). In both cases, the Board may intervene only with the approval of the Minister of Labour who decides, at his discretion, whether the Board should be asked to examine the collective bargaining process and find a solution or remedy, if the Board believes that the law so requires. Intervention by the Board in the collective bargaining process is therefore exceptional.

The Board must therefore establish the parameters of its intervention in the collective bargaining process within this legislative framework. In CJMS Radio Montréal Limitée et al., supra, the Board commented on the decision of Parliament to favour the establishment of conditions of employment through collective bargaining:

"... It does so for many reasons which stem from the conviction that the best way to govern employer-employee relations is to make them subject to a labour code which contains mechanisms for attaining the most orderly and harmonious relations possible, failing which the parties will feel the sting of law and order. Another reason is the conviction that there must be a balance of power between the two parties involved in the production of goods or services, a balance that will ensure mutual respect based on healthy fear."

(pages 831; and 363)

A little later, it added:

"Theoretically, employees or workers who elect to become unionized are entitled to do so without being hindered by their employers. This unionization, whether or not accompanied, under the Canada Labour Code, by certification or voluntary recognition by the employer, should lead logically to the negotiation of a collective agreement. The Code envisages certain procedures for setting this process in motion."

Now begins that difficult and complex process known as the negotiation of a collective agreement. It is difficult because it must bear the stamp of prudence, responsibility, lucidity and reason on both sides of the bargaining table."

(pages 832; and 363)

(See also National Harbours Board (1979), 33 di 530; [1979] 3 Can LRBR 502; and 79 CLLC 16,204 (CLRBR no. 195).)

Similarly, in respect of a complaint concerning a violation of section 50(a) in CKLW Radio Broadcasting Limited, supra, the Board sketched a complete picture of the legislative scheme governing collective bargaining and outlined its role from the point of view of respecting the balance of power between the parties:

"... The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy, or an indicia, among others, of bad faith. Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a genteel fashion. At the same time, the Board must ensure that one party does not seek to undermine the other's right to engage in bargaining or act in a manner that prevents full, informed and rational discussion of the issues."

(pages 58-59; and 696)

Commenting on this statement in Brewster Transport Company Limited, supra, the Board added:

"It is clear from the excerpt that the Board's role is not to assist any one party in a bargaining dispute to achieve its ends, but rather to ensure that one party does not take advantage of the other by illegal or unlawful tactics at the bargaining table."

(pages 38; 376-377; and 14,384)

The Board followed this approach, and summarized it clearly, in Canadian Broadcasting Corporation (1987), 70 di 26 (CLRBR no. 629), when, after reviewing the decisions of the Board in this area, it stated:

"Contrary to what some commentators may have expressed, the Board still maintains that it is not a substitute for free collective bargaining. The Board will not be used as an instrument for resolving collective bargaining impasses and it will only intervene in the free collective bargaining system in extraordinary cases. The Board will make every effort not to interfere with the balance of power at the bargaining table. Nor will it restrict the exercise of such power unless a party is using its power to achieve objectives which are clearly unlawful or which are intended to defeat the purposes of the Code."

(page 33; emphasis added)

2. The Concept of Good Faith Bargaining

Generally speaking, the duty to bargain in good faith and the duty to make every reasonable effort to enter into a collective agreement have been considered two elements of one and the same duty. This approach was taken by the Board in Brewster Transport Company Limited and CKLW Radio Broadcasting Limited, supra. In the latter case, in particular, the Board adopted the principles already laid down by the Ontario Labour Relations Board in Canadian Industries Limited, [1976] OLRB Rep. May 199; [1976] 2 Can LRBR 8; and (1976), 76 CLLC 16,014.

"Good faith bargaining is then left to be defined in terms of the manner in which collective negotiations should be conducted. The approach taken by the parties, as evidenced by their conduct, becomes important, two factors being of particular significance - one is recognition, the other is the quality of discussion. As was stated in De Vilbiss (Canada) Ltd., supra,

'The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.'

...

The conduct of the negotiations is not only judged in terms of mutual recognition but also in terms of quality of discussion. This latter factor is somewhat broader in its application, extending to those situations where there may be present the common objective of entering into collective agreement, but where there is absent any willingness to discuss how that common objective might be reached. Reference to this aspect of the

duty was made by Roach, J.A., in Regina ex rel. Hodges v. Dominion Glass Co. Ltd., [1964] 2 O.R. 239 at p. 247:

'There may be some subtle distinction between bargaining in good faith and making every reasonable effort to make a collective agreement but it is so tenuous and elusive as to lose any legal significance.

... That duty contains two ingredients, that are so inseparable and so blended as to lose their separate identities, the one to bargain in good faith and the other to make every reasonable effort to make a collective agreement. Good faith is demonstrated by an honest and reasonable effort to make a collective agreement so that where the one exists so also does the other. This relationship between the two was thus expressed in National Labor Relations Board v. George P. Pilling & Son Co. (1941), 119 F. (2d) 32 at p. 37:

"Bargaining presupposes negotiations between parties carried on in good faith. The fair dealing which the service of good faith calls for must be exhibited by the parties in their approach and attitude to the negotiations as well as in their specific treatment of the particular subjects or items for negotiation. For such purpose, there must be common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason.""

(pages 202-203; 12-13; and 447-448; reproduced in Brewster Transport Company Limited, supra, pages 38-39; 377-378; and 14,385)

Thus it appears that the Board is not trying to find a subtle distinction between the terms used in the law when it considers an allegation that section 50(a) has been violated; rather, it attempts, in a concrete manner, to examine whether the conduct, attitudes and approaches of the parties at the bargaining table amount to a willingness to commence and maintain serious discussions with a view to entering into a collective agreement. The Board cannot make an appropriate assessment, respecting the rules of the principle of free bargaining, without considering the overall, general context of the collective bargaining and the relations between the parties.

This was the conclusion reached by the Board in Royal Bank of Canada, Kénogami, Quebec, et al. (1980), 41 di 199; and [1982] 1 Can LRBR 16 (CLRBR no. 267). In that case, the Minister of Labour had asked the Board to inquire and determine whether it was advisable to settle the terms and conditions of a first collective agreement. On the question of determining whether there had been good faith bargaining, a criterion that applies in this type of situation as in the case of a section 50(a) complaint, the Board stated:

"In exercising our discretion, we must determine if this impasse results from bargaining in good faith. Under such circumstances, we must appreciate the general conduct of the parties as actual negotiations unfold as well as their conduct away from the bargaining table, starting from the point at which the union came into the undertaking. It is obvious that no party will readily admit to bargaining in bad faith. Obviously, an appreciation of such a subjective element can only be drawn from circumstantial evidence. However, what takes place between the parties must be definitely related to the bargaining process and the resulting impasse."

The difficulty lies in determining whether the employer is engaging in hard bargaining but is doing so in good faith or is making a pretense of bargaining. In The Daily Times, [1978] OLRB Rep. July 604, the Ontario Labour Relations Board was dealing with a complaint alleging a breach of the duty to bargain in good faith, and said the following:

'... "Surface bargaining" is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between "surface bargaining" and hard bargaining. The parties to collective bargaining are expected to act in their individual self-interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even "predictably unacceptable" is not sufficient, standing alone to allow the Board to draw an inference of "surface bargaining". This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the

whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of "surface" bargaining can be made.'"

(pages 211-212; and 26; emphasis added)

The Board adopted this approach to the study of the concept of good faith bargaining in Huron Broadcasting Limited (1982), 49 di 68; [1982] 2 Can LRBR 227; and 82 CLLC 16,167 (CLRB no. 378):

"The very nature of collective bargaining where extreme or apparently unjustifiable positions may be taken in specific areas in order to camouflage real concerns in other areas makes it difficult for the Board to determine the presence of unlawful motives. It is certainly ill-advised to isolate any one act to base a finding of bad faith bargaining. The whole picture must be viewed and even then, true intent may be blurred in the guise of bargaining strategy."

(pages 80; 236; and 682)

and in Royal Bank of Canada, Kénoqami, Quebec, et al., supra:

"We share this point of view and are of the opinion that the distinction between hard bargaining and bargaining in bad faith lies essentially on an appreciation of the facts of each case and must take into account their entire relationship."

(pages 212; and 27)

More recently, in Canadian Commercial Corporation (1988), 74 di 175 (CLRB no. 702), the Board proposed the following analysis of the duty to bargain in good faith:

"What constitutes a failure to bargain in good faith and a failure to make every reasonable effort to enter into a collective agreement is not capable of definition in a few words. The cases suggest that the presence of certain factors - which will be mentioned hereafter - not necessarily alone, but usually in a broader context, may well lead to a conclusion that the duty to bargain in good faith has not been met.

Collective bargaining is seldom easy or philanthropic. And that is no crime. One party, either the union or management, may possess

particular economic power at a particular time and may exercise it to the fullest extent possible. So long as this is done within a bargaining context where the ultimate intention is still to achieve a collective agreement and go on living with the other party - albeit with an agreement that is perhaps more favourable at that time to the interests of the more powerful party - it cannot be said that the bargaining has been carried out in bad faith. Simply because a particular round of bargaining is not concluded without the threat or the actuality of strike or lockout action does not mean per se that bad faith is present. Nor does the fact that a particular round of bargaining may produce a relative winner and a relative loser in the resulting collective agreement.

The fact that either party takes a determined or adamant line on issues and engages in very hard bargaining does not of itself signal a violation of the law, so long as one party does not apparently intend by so doing to destroy the other. Destruction of the other may, however, be an unintended by-product of very tough bargaining and the full exercise of the bargaining power possessed by one party at that time. The other party is expected to be wise and wary enough to see such a possibility and to be prepared to make the necessary compromise so that utter defeat is avoided. In collective bargaining, as in life, deliberate murder of one party by the other is a crime; however, suicide is not.

In real life, however, the picture is seldom so stark and uncomplicated. This and other labour relations boards have found, for example, that where a union saw it was in a losing position and proposed to accept surrender terms and the employer then tried to impose a further condition or further conditions to a settlement - tried to tighten the screws a bit more - such action was not in good faith. Or where a party took an adamant position that unless the other side accepted what was in fact a condition contrary to the Code or a condition that was totally unfair, unjustifiable or unreasonable under the circumstances, that would be bad faith bargaining. Having found the latter, boards have been quick to qualify their opinions by pointing out that in these situations they have been dealing with bargaining proposals that are well outside the norm and that they are judged irrational or unreasonable not necessarily on their own merits but because they are linked into a context in which it seems apparent that one party is really attempting to put the boots to the other.

Bad faith has been judged present in situations where one party has advanced a key position curtly and without any attempt to justify, explain or rationalize it; where there has been no serious discussion of the matter and the atmosphere created is one of 'take it or leave it and bloody well face the consequences.'

(pages 186-188; emphasis added)

3. Wage Parity and Good Faith Bargaining

The question of fairness, or of parity in conditions of employment, whether relating to salary or otherwise, between various groups or classifications of employees has been considered by labour relations boards in various contexts involving complaints of unfair labour practices, including complaints of bad faith bargaining.

For example, in Irwin Toy Limited, [1983] OLRB Rep. July 1064; and 83 CLLC 14,415, the Ontario Labour Relations Board had to deal with a revocation application and a complaint of bad faith bargaining. In that case, the employer had two establishments, only one of which was unionized. The nature of the work and the employees' duties in the two establishments were comparable, and nothing warranted, a priori, different salaries. Shortly after the first collective agreement was signed, the employer gave its non-unionized employees a 14% salary increase, or 1% more than what had been negotiated; it established a very generous health insurance plan, which excluded the employees covered by the collective agreement. During negotiations for the second collective agreement, the employer offered an 8% increase at the bargaining table, an increase of less than what had previously been given to non-unionized employees. The Board found that the employer's position was not based on economic considerations, and decided that the employer had been guilty of bad faith bargaining, in view of the context and facts in the case. The Board stated the following principle, on which it based its decision:

"It is obviously not axiomatic that the unionized employees in one plant of an employer must necessarily receive the same treatment in respect of wages and benefits as comparable employees in another plant. Economic considerations may justify different wages and benefits in different work places. By the same token, it is plainly unlawful for an employer to punish a group of employees because they have chosen union

representation or to reward another group because they have not. If it is unlawful for an employer to make such distinctions, it is equally in violation of the Act for it to bring them forcibly to the attention of the employees as a means of discouraging union support in the course of bargaining or in a representation vote. ...

...

The different treatment of employees may be explained on the basis of legitimate economic reasons. Where, however, no such reasons are apparent and, as in the instant case, no evidence is forthcoming to explain the preferential treatment of one group of employees over another, the Board must look with great care to the whole of the evidence. ...

...

... It is also a violation of the duty to bargain in good faith for an employer to advance, without any economic justification, an offer to its unionized employees which is intended as a message that they will suffer economically as long as they choose to be represented by a union or exercise the rights of organized employees. ...

...

The motive for an unfair labour practice is seldom, if ever, admitted. More often that [sic] not it must be inferred from the preponderance of the evidence. In this case the conduct of the respondent in a sustained pattern compellingly suggests anti-union motivation as the most probable explanation for its actions. ..."

(pages 1067-1077; and 14,417-14,420; emphasis added)

More recently, in MacMillan Bloedel Building Materials Limited, [1990] OLRB Rep. Jan. 58, the Ontario Board had to decide, at the request of the union, whether a first collective agreement should be imposed. The union argued that the employer had taken an intransigent position on a bargaining matter, with no reasonable justification, contrary to the Act. Although that case may be distinguished from the instant case, since this Board is not considering a request to settle the terms of a first collective agreement, the general principles reiterated in that case should be recalled. The Board had to consider the reasons why an employer may refuse to offer or to maintain benefits for unionized staff comparable to those for non-

unionized staff. In that case, the employer refused to continue to give its recently unionized employees the same salaries they had enjoyed prior to unionizing, since those salaries were higher than what was generally paid or offered by other firms in this particular industry.

The employer believed that giving the same benefits in collective bargaining as had until then been paid only to non-unionized employees would have an impact on other employees' wish to unionize and on the union's wish to obtain these benefits in negotiations with other groups. At no time did the employer claim that it could not pay these benefits, which it had paid before unionization. Finally, the employer amended its proposal to maintain the benefits given to current employees and proposed a lesser plan for new employees. In analysing these bargaining positions, the Board stated:

"... It [the employer] was only concerned that it not pay its unionized employees these high benefits. The objection was to continuing to pay such levels to employees because they were now organized. These justifications, looked at in context, are designed to send a message that unionizing will cost employees the benefits they had received prior to becoming organized. Although current employees and those hired before January 1, 1990 would continue to receive the current benefits, a two-tiered system as proposed by the employer would clearly foment dissension within the bargaining unit and with the bargaining agent. It is a proposal which will likely lead to a decertification application, for under it new employees will receive less benefits only because the union represents them. ... The employer's bargaining position is also designed to discourage other employees who might want representation, and unions who might seek to organize them. It tells them that the response to unionization is a reduction in benefits. It is qualitatively no different a message than threatening to lay off employees or close the business only because employees have organized or are contemplating so doing. This bargaining position is not reasonably justified for purposes of section 40a(2)(b) of the Act. It is not reasonable to take a position of reducing current benefits when one of the main reasons for doing so is only because a union now represents employees."

(page 62-63; emphasis added)

In Dominion Directory Company Limited, [1975] 2 Can LRBR 345, the British Columbia Labour Relations Board held that offering unionized salespeople conditions for the use of a car that were inferior to those they enjoyed prior to unionizing amounted to bad faith bargaining. After examining the employer's reasons, including the economic aspect, and after noting that it was not for the Board to assess the merits of offers, the Board nonetheless found that this bargaining position, when viewed in the general context of negotiations, amounted to a violation of the duty to bargain in good faith. It stated:

"This is not to say that any employer proposal involving a cutback of benefits violates s. 6. One can easily imagine situations where such a cutback can be proposed in good faith. It may be merely an opening ploy by an employer or necessitated by valid economic considerations. Here, however, the timing of the car proposal, the absence of any economic justification and especially the Company's disavowal of the proposal to the leader of the decertification faction, all suggest that Dominion was attempting to ensure disenchantment among the employees with the Union's bargaining efforts. The car proposal, in the particular context in which it arose indicates, and the Panel so finds that, Dominion was not bargaining in good faith."

(pages 355-356; emphasis added)

These decisions illustrate cases in which the desire of an employer to establish conditions of employment through collective bargaining that are inferior to those that existed prior to unionization, or are unfavourable when compared with those for other groups of non-unionized employees whose duties and qualifications are comparable, has been found to be contrary to the duty to bargain in good faith and, in all cases, unlawful. These conclusions are based on the general context of negotiations, the specific situation of the parties and the reasons and justifications put forward in support of such proposals.

The mere fact of offering different conditions of employment to different categories of employees is not in itself a violation of the duty to bargain in good faith. However, the manner in which the negotiations unfolded may, in some circumstances, lead to a finding that the conduct of an employer who has made offers of this nature or taken such positions at the bargaining table is contrary to the Code.

VI

The Decision

The Board must decide whether, in the circumstances of the instant case, the respondent employer, by offering salaries to the employees in the bargaining unit that were different from and, in this case, lower than the salaries given to the group of non-unionized employees, adopted a punitive and unfairly discriminatory attitude toward the group of unionized employees, as the union argues in this case, and thereby violated section 50(a) of the Code.

In examining this question the Board considered all circumstances surrounding this collective bargaining process, and specifically the number, content and chronology of bargaining sessions, along with all proposals put forward by the parties and their respective bargaining objectives and justifications in support of the positions taken - in short, the parties' general attitude at the bargaining table. The content of the various proposals, in particular the salary offers, was considered in order to understand and assess the general context and results of these negotiations from the point of view of the requirements of the Code.

Analysis of the Collective Bargaining Process

1. The Manner in Which Bargaining Unfolded

At first glance, this collective bargaining process is not remarkable in comparison to the generally accepted usage and custom in this area, particularly for parties in their first collective bargaining effort. The first discussions concerned subjects not directly related to the content of the collective agreement (the dismissal of an employee, the presence of the personnel manager at the bargaining table, the language of the negotiations, and so on). While at one time these subjects may have been the subject of friction and may have caused a certain amount of delay, these issues do not seem to have had a decisive impact on the issue in this case. This is not true, however, of the changes that occurred in the bargaining positions, with respect both to standard clauses and to salary.

The Standard Clauses

On December 16, 1988 the union had agreed, in respect of several standard clauses, to the conditions in effect before unionization which still applied to non-unionized employees - in short, the status quo. This partial agreement was never formally ratified by unionized employees, since the final and all-inclusive offer of December 16, 1988 was rejected as a whole, precisely because of the salary issue.

Similarly, in April 1989 the agreement between the parties, which this time was complete as to the standard clauses, was never ratified again because of what were considered to be unacceptable salary offers. These issues are therefore still formally in dispute, given the rejection at that time of the last management proposal as a whole.

The results of the negotiations of April 1989 dealing with the standard clauses may be summarized as the status quo, with the exception of a few breakthroughs, the substance of which was explained earlier. These fringe benefits applied until December 31, 1990, when the proposed collective agreement was to expire. Taken in isolation, these results may appear rather slim, but they might be explained by the fact that this was a first collective agreement. However, in order to assess truly all aspects of this result, we must place it in the general context of the conditions of employment that applied during the same period to Iberia's non-unionized employees, some of whom, we would recall, are in the same classification as unionized employees.

On this point, the non-unionized employees' conditions of employment, which were adjusted on June 30, 1989, effective on May 1, 1989, provided among other things for an increase in the meal allowance that was higher than the increase granted to unionized employees in April 1989; an improvement in the vacation provisions; the same number of days of leave without loss of salary for non-unionized employees as were negotiated in April 1989; and an increase in the annual percentage for reimbursement of sick leave.

In short, the few gains in the standard clauses in monetary terms that had been realized in April 1989, after 18 months of bargaining, and that would apply until December 31, 1990, were of considerably reduced effect: as of May 1, 1989, non-unionized staff would enjoy benefits superior, in some cases, to those given to unionized employees. Thus even in respect of the standard clauses it is easy to see that unionized employees have made no substantial gains in relation to the conditions of employment they would have had if they had not been unionized.

If the employer chooses to alter the conditions of employment of a group of employees based on what it has granted to unionized employees, there would not appear to be any problem; this is rather a common occurrence. However, if it chooses to make a better offer, the point at which it is made, that is, a mere few weeks after the union rejected the complete offer solely because of the salary terms, adds to the pernicious effect of this attitude. The employer provided no justification or reason to support its conduct. These facts, taken as a whole, lead us to conclude, with no hesitation, that the intended objective was to demonstrate the uselessness of a union and to endanger its viability, which is a violation of section 50(a) of the Code.

Salary

The Board's analysis of the various salary offers leads us to conclude as follows.

1. The salary offers of September 1988, December 1988 and April 1989 were systematically lower than what was offered to non-unionized staff for the corresponding periods.
2. The degree to which they were inferior varied from offer to offer and time to time, but the disadvantageous gap always followed an ascending curve, keeping in mind that in May 1988 non-unionized staff received a 5% increase which was not given to unionized employees at the time. In September 1988 unionized employees were offered only 3%, for one year, not retroactive. This offer represented just about nothing in terms of salary increase, since that 3% increase was

accompanied by a major expense in respect of the pension plan.

Moreover, the proposed increases applied only to the extent that they would not result in salaries above the maximum salary for the job classification as it was on May 1, 1987.

Furthermore, in December 1988, the same 3% annual increase was offered again, this time accompanied by a quarterly increase of 1%, for a period of two years. This offer, together with a lump sum payment, is still lower, and for no apparent reason, than the conditions already given to non-unionized employees, in May 1988.

Under the April 1989 offer, there was for all practical purposes no percentage increase. The stated pretext was the automatic increment on January 1, 1990. This has no tangible significance in respect of the increase in the salary scale, an increase of 0.55% to 2% under this offer. These percentages, which would apply to the scale in January 1990, appear even more ludicrous when they are viewed in the perspective of the 5% increase given on May 1, 1989.

All salary proposals, including the final offer, result in a significant and permanent loss of income for unionized staff. Were it not for the fact that they had joined the union, the employees would have received a 10% increase built into the salary scale for the period from May 1, 1988 to April 30, 1990, plus an "exceptional" bonus of \$500 for 1989-90. The final, all-inclusive offer made to the union on April 13, 1989, for the period from May 1, 1988 to December 31, 1990, was an 8.5% increase, if we include the automatic increment. The percentage increase represented

by the increment is not built into the salary scale. As a result, if we deduct the percentage equivalent of this increment, the real increase built into the salary scale, for the period in question, is 4.55% to 6%. These percentages do not include the lump sums offered for 1988, since the effect of those payments was considerably mitigated by the fact that in April 1989 an "exceptional" bonus of \$500 was given to non-unionized employees. In addition, the fact that these amounts were not built into the salary scale enlarges, slowly but surely, the gap between the salary scales for unionized and non-unionized employees.

In fact, what is striking on looking at these salary offers is, of course, the deliberately and systematically inferior nature of these offers, but also and most especially the employer's clear intent to demonstrate in this way that the existence and presence of a union in the firm would not serve any purpose, either now or later, and either for unionized or for non-unionized employees. Looked at this way, a chronological examination of all the employer's offers convinces us of its firm and continuing intent to maintain a gap that would disadvantage unionized employees in establishing conditions of employment, and in particular salaries. This was not a gratuitous decision; the employer knew full well that it is in this essential area, the effects of which are felt every day, that the blow will be felt hardest, particularly among employees whose salary level is not of astronomical proportions. However, in June 1989, the employer went further. Not only did it give non-unionized employees the "gains" negotiated in April 1989, but it also improved them, particularly in respect of vacation, with no other apparent reason or justification. Not only did it increase salary scales by 5%, which is vastly superior to the scale increases of 0.55% to 2%

proposed to the union in April 1989, but it threw in a "free" bonus of \$500 for 1989-90.

It is important to recall that never, until the union arrived on the scene, had there been any differences in annual increases given by this employer, except for management personnel coming from Madrid. Never, since 1970, had an "exceptional" bonus like the one handed out in 1989 been given.

The employer attacked the union using salary offers that were designed, not so much by their substance per se as by the timing, to block the bargaining process. These proposals could not actually be accepted by unionized staff without the employees agreeing at the same time to question the very existence of the bargaining agent, in the short or long term, if they wanted to have any hope of obtaining conditions of employment that were equivalent to what they had before joining the union.

This is the expression of an intention to provide a clear demonstration of the complete uselessness of a bargaining agent in the firm, since the employer in its discretion always handed over more to another group of employees than what the union had succeeded, after repeated efforts, in "grabbing" at the bargaining table.

Refusal to Bargain in August 1989

In August 1989 the parties had neither met nor spoken since April 13, 1989. In response to the union's request for a bargaining meeting, the employer refused, stating among other things that it would not negotiate with a complaint hanging over its head. This is contrary to the Code.

As we saw earlier, the duty to bargain is a continuing duty and is not diminished by the filing of a complaint with the Board (see CKLM Radio Broadcasting Limited, supra, pages 89; and 713).

On the other hand, the withdrawal of a matter before the Board may be a subject of negotiation. However, there is a limit, which is what we call bargaining to an impasse.

Thus the Board noted in Inuvik Housing Authority (1987), 71 di 1 (CLRB no. 645), that a party cannot maintain its demand for withdrawal or resolution of a complaint before the Board to the point of impasse. The Board stated:

"This issue was often canvassed by labour boards. The law on the issue is clear: the parties may raise that issue at the bargaining table, however, that issue '... may not be pushed to an impasse ...' (Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574), pages 44; 383; and 14,388)."

(page 8)

The rule laid down in that case holds particularly true when the complaint relates to bad faith bargaining, as is the case here. Iberia had the opportunity to go back to the bargaining table to pursue negotiations. The employer refused to do so, for no valid reason, and in this case that is a violation of section 50(a).

2. The Employer's Bargaining Objectives

As we have seen, Mr. Romero explained his bargaining objectives to the Board, the first being to maintain a balance between the unionized and non-unionized groups in terms of conditions of employment and remuneration.

The facts and the conduct of Iberia, when examined, contradict Mr. Romero's statements and intentions. Thus,

in September 1988 and December 1988 the employer did not accede to the union's demand for automatic advancement and did not reply to the union demand with respect to automatic promotion, but nonetheless offered a lower salary scheme, without any justification or attempt at justification at any time or in any way. Then in April 1989 the agreement to automatic increments resulted in a reduction in the real percentage increase. There again, and still, the final result was lower than the scheme applied to non-unionized workers.

If we examine the chronology of this collective bargaining process we find that at no time did the employer take concrete, practical and real steps to ensure the objective of balance between the various groups of employees, which objective was, according to it, the decisive approach and objective in its bargaining positions. There are too many factors that make it impossible for us to give credence to Mr. Romero's statements. The Board notes in particular his last statement indicating that he did not take any account of the conditions offered to unionized staff in April 1989 when the non-unionized staff's conditions of employment were established for 1989-90.

In the view of the Board, that is in complete contradiction with Iberia's stated objective of balance. While this objective would indeed require that the employer take into account, as it said, the impact of the collective agreement on the rest of non-unionized employees, the reverse is equally true: the balance could not be tipped against one group, or there would be no balance. Given that the employer has never been able to explain this apparent imbalance rationally and credibly, the only conclusion we can reach is the following: the employer had the firm intention of making those affected understand that their

wish to unionize and to bargain collectively would give them nothing in comparison to their non-unionized colleagues.

3. The Historical Context

One other element sheds light on this case: the union organizing period for this small group, during which the Board had to intervene on several occasions. The period preceding the application for certification, from February 19, 1987 to November 11, 1987, a few days before the first bargaining session, saw the filing of four complaints of unfair labour practices, all of which were allowed.

The first of these complaints sought to set aside the transfer of the union president from the Montréal office to the Ottawa office when the union was about to apply to the Board for certification. This complaint was allowed in the decision issued February 11, 1987 (Iberia Airlines of Spain (1987), 68 di 133 (CLRB no. 608)). An application was made to the Federal Court of Appeal to review this decision, which application was refused on September 18, 1987. Following that judgment, in October 1987, the union applied to the Board for permission to file this decision in the Federal Court (Trial Division), alleging that Iberia had not implemented all remedies set out therein. On January 28, 1988 the Board, finding that the application to file the decision should not be allowed, decided to issue a supplementary remedial order, since Iberia had not complied with its initial order (Iberia Airlines of Spain (1988), 72 di 222 (CLRB no. 671)). The last complaint, filed in November 1987, sought to set aside the dismissal of an employee who had earlier testified before the Board in another matter. The Board allowed this complaint on June 30, 1988 (Iberia Airlines of Spain (1988), 74 di 153 (CLRB no. 700)). The two other complaints sought to revoke

disciplinary measures imposed on two employees. The decisions dealing with these complaints were issued on May 25, 1988 (Iberia Airlines of Spain (1988), 74 di 1 (CLRB no. 687), and Iberia Airlines of Spain (1988), 74 di 29 (CLRB no. 688)).

It is accepted that in hearing a complaint of bad faith bargaining the Board may take into account the history of relations between the parties, and in particular their respective conduct as it relates to the provisions of the Code.

On this point, in Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America et al. (1980), 80 CLLC 14,017, the Ontario High Court, after noting that a complaint of bad faith bargaining must be decided taking into account the overall context surrounding the acts which are the subject of the complaint, held that in such matters the Board may examine present conduct as well as conduct before and after the period when bad faith is alleged. However, referring to the question of proximity in time of all these elements, the Court added:

"As soon as that is said, a caveat should be added that the time element must be of great significance; that is to say the more proximate the prior findings of anti-union animus are to the matter under consideration, the more significant they may be. In this case, the prior decisions of the Board indicating the anti-union animus were made relatively close to the time under investigation in the complaint before the Board. ..."

(page 91)

On the same point, in one of the decisions in question here, Iberia Airlines of Spain (687), supra, after referring to the same case, the Board stated:

"... [The Board] cannot exceed the limits of what is commonly called natural justice, although natural justice must not be confused with

formalism. Only the decision itself is to be considered: its nature, the date, the parties to the dispute and the Board's findings. This does not involve bringing in external evidence, which would be impossible at any rate, but seeing whether the decision in question contained an element relevant to another case before the Board."

(page 6)

Thus the Board will take into consideration in hearing complaints of bad faith bargaining the existence of anti-union animus that has been demonstrated on several occasions. In the instant case, there is no doubt that the proceedings that have been instituted since the start of union organizing shows Iberia's anti-union animus. The nature of the decisions in which it has been held that Iberia contravened the provisions of the Code on several occasions, during the time and in the circumstances in which it did so, is an additional factor, which together with other circumstances in this case are sufficient in themselves, leads to the conclusion that there was continuing and well-established bad faith on the part of this employer. Proximity in time has also been established, and in short, these past attitudes provide a better appreciation of the present context of these negotiations.

VII

The Conclusion

The manner in which the employer approached and conducted negotiations in the instant case in no way shows its intention to enter into a collective agreement within the meaning of the Code, that is to say to enter into a true collective labour agreement, which would not itself contain terms leading to the disappearance of the union, in the short or long term. There is no doubt that a collective agreement that was agreed to and entered into on the terms

proposed by the employer in April 1989 would have directly resulted in questions about the certification order. Very few people would agree to continue as members and promote the existence of an organization that could only, after several months of effort and much time and energy, get for them conditions of employment that were worse than those obtained without the "benefit" of such an organization. This sort of situation is particularly intolerable in that there was no reasonable or credible explanation given to support such a result. To anyone facing such a situation, the freedom of association provided in the Code is a delusion.

The employer's bargaining positions were inflexible and intransigent to the point of endangering the very existence of collective bargaining. The employer was not engaged in hard bargaining with the aim of protecting its legitimate interests within the framework of collective and negotiated labour relations. The employer was engaged in surface bargaining. At the formal level, it adopted an approach that was at first glance above reproach, as the usual motions are. On closer view, this approach was unlawful, unjustifiable and contrary to what is permitted in good faith bargaining. The employer bargained ably and subtly, taking a passively resistant position, under cover of a positive, active position at the bargaining table, but never showing that it genuinely wanted to enter into a collective agreement. In this sense, the fact that the employer acknowledged that it had not analysed or assessed the cost of the salary demands and offers is particularly revealing. Although Mr. Romero stated that the firm's financial ability was never a barrier to giving unionized employees conditions of employment that would be comparable to those offered to non-unionized staff, one might have expected that the employer would nonetheless assess the cost and economic

impact on the firm of doing so. Mr. Romero knew that the offers made to unionized employees were inferior to the conditions offered to non-unionized employees, without however being able to specify how or by how much. Given this situation, the Board must find that the only determining factor was therefore that the offers had to be lower, and that's all. The employer did not offer any explanation, economic, business or other, for its bargaining decisions. Such a position is patently unreasonable, and the Board can only conclude that the employer's motivations, as explained and put into action by Mr. Romero, amounted to a violation of section 50(a) in this case.

Given the evidence and the history of the relations between the parties, the employer's conduct demonstrates that the employer was trying to establish unfairly different conditions of employment for unionized employees and their non-unionized colleagues, solely because of their membership in the union. At the same time, the employer was attacking the very existence and credibility of the union. The evidence revealed that the failure of these negotiations resulted not from a natural imbalance of power between the parties. The employer caused the failure by its attitude, which was contrary to the Code. If, as the employer argued, the union was "weak" at the bargaining table, this apparent weakness, or its inability to get out of the impasse, resulted here from the unlawful actions of the employer and not from the operation of free collective bargaining. It is permissible to bargain firmly and hard. However, by its actions, Iberia was not trying to enter into a collective agreement, but rather to make what it considered to be an undesirable counterpart disappear.

For all these reasons, the Board allows the union's complaints and finds that the respondent employer has

bargained in bad faith and has not made every reasonable effort to enter into a collective agreement, contrary to section 50(a) of the Code.

VIII

Remedies and Orders

The scope of the powers of the Board in respect of complaints of bad faith bargaining is set out in section 99 of the Code.

Section 99 provides:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

We dealt earlier with the rules and principles laid down in the case law concerning the nature and extent of the Board's powers to intervene in collective bargaining when it must determine section 50(a) complaints. Applying these rules to the instant case, the Board has decided to intervene by ordering remedies. The Board has made this decision based on the nature of the violations of the Code by the employer and on its conviction that the employer had no intention of

changing the position it had taken at the bargaining table unless a third party intervened.

The situation in which the parties find themselves is a direct result of the unlawful acts of the employer. By refusing as it did to offer its unionized staff the same salary as it had given its non-unionized staff, it chose to bring the collective bargaining process to an impasse so that it became necessary for the Board to intervene.

If the employer had not unlawfully refused to offer its unionized staff wage parity with non-unionized staff, union members would have been in a position since mid-April 1989 to vote on a complete draft collective agreement.

While the members could have voted on such a draft collective agreement, comprising the agreement already reached on standard clauses and a salary proposal establishing parity with non-unionized employees, that is, containing the same annual increases as those given to the latter since May 1, 1988, these negotiations could have been terminated at that point. Similarly, Iberia employees would within a few weeks have received retroactive salary payments. However, this opportunity was never offered to unionized employees.

Given the circumstances of this case, the Board considers that the union members should be given the opportunity to exercise freely the choice of voting on a complete draft collective agreement, as they should have been able to do in April 1989. The evidence revealed that this collective agreement would have run from mid-April 1989 to December 31, 1990, the expiry date agreed upon by the parties.

Accordingly, the Board issues the following orders.

- (1) Iberia should cease contravening section 50(a) of the Code.
- (2) Iberia, subject to the other remedies provided in these reasons, should commence bargaining in good faith and make every reasonable effort to enter into a collective agreement.
- (3) Iberia should submit to the union in writing, by May 31, 1990 at the latest, a complete draft collective agreement including:
 - (a) the agreement reached at the bargaining table on standard clauses and monetary impact, which agreement had already been set out in the document prepared by the employer entitled "Draft collective agreement - April 13, 1989" (Exhibit 11C in the Board's file). Only Schedule B, dealing with salary increases and increments, and any reference that may be made to this schedule, shall be stricken from this document;
 - (b) a salary offer establishing wage parity with non-unionized employees since May 1, 1988 and maintaining such parity until the expiry of the collective agreement on December 31, 1990;
 - (c) the term of this collective agreement, which shall be from April 15, 1989 to December 31, 1990;
 - (d) payment of an exceptional bonus of \$500 to the employees employed by Iberia on May 1, 1989.

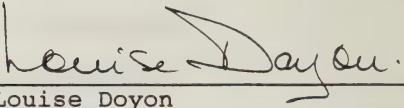
A copy of this draft collective agreement shall be sent to the Board by the same date.

- (4) The union should submit this draft collective agreement to its members by June 5, 1990 at the latest. If the union accepts this draft collective agreement, it shall inform the employer and the Board by June 7, 1990 at the latest. The parties shall sign this collective agreement by June 12, 1990 at the latest. This collective agreement shall be deemed to be in effect as of the date it is ratified by the union.
- (5) Iberia should make retroactive salary payments by June 30, 1990 at the latest.
- (6) If the union rejects the draft collective agreement, collective bargaining shall continue and the parties shall meet to bargain in good faith and make every reasonable effort to enter into a collective agreement.

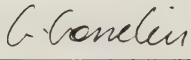
The Board appoints Suzanne Pichette, senior labour relations officer in the Board's office in Montréal, to assist the parties in implementing these remedies.

If the parties do not agree on the implementation of the above remedies, the Board reserves the right to intervene to resolve any problems arising from the implementation of this decision.

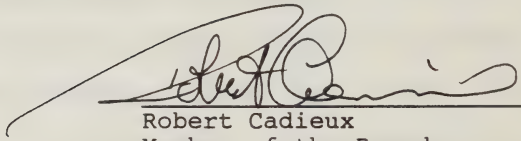
The Board reserves jurisdiction under section 20(1) of the Code to order any further remedy in addition to those set out above.



Louise Doyon
Vice-Chair



Ginette Gosselin
Member of the Board



Robert Cadieux
Member of the Board

ISSUED at Ottawa, this 17th day of May 1990.

information

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Summary

CANADIAN AIR LINE PILOTS' ASSOCIATION,
APPLICANT, CANADIAN AIR LINE
DISPATCHERS' ASSOCIATION, APPLICANT,
WESTERN CANADA COUNCIL OF TEAMSTERS,
APPLICANT, AIR B.C., EMPLOYER,
CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS,
CERTIFIED BARGAINING AGENT/INTERVENOR,
AND INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 115, CERTIFIED
BARGAINING AGENT/INTERESTED PARTY.

Board Files: 555-2981
555-2996
555-3024
530-1738

Decision No.: 797

This decision deals with the
rationalization of the bargaining
unit structure at Air B.C. This was
prompted by three applications for
certification by CALPA, CALDA, and the
Teamsters seeking to carve out
bargaining units which were limited
to certain occupational groups of
employees from two existing bargaining
units which were represented by the
CBRT & GW and that were covered by a
single collective agreement.

The Board allowed the fragmentation
of the existing bargaining units
notwithstanding that this goes against
the trend towards broader-based
bargaining. The Board found that a
five bargaining unit structure at Air
B.C. is appropriate and that this
reflects the practice which has
evolved in the airline industry based
mainly on the divergent communities
of interest of the various
occupational groups in this industry.

Résumé de Décision

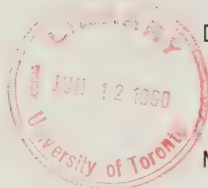
ASSOCIATION CANADIENNE DES PILOTES DE
LIGNES AERIENNES, REQUERANTE,
ASSOCIATION CANADIENNE DES REGULATEURS
DE VOLS, REQUERANTE, WESTERN CANADA
COUNCIL OF TEAMSTERS, REQUERANT, AIR
B.C., EMPLOYEUR, FRATERNITE CANADIENNE
DES CHEMINOTS, EMPLOYES DES TRANSPORTS
ET AUTRES OUVRIERS, AGENT NEGOCIEATEUR
ACCREDITE/INTERVENANTE, ET UNION
INTERNATIONALE DES OPERATEURS DE
MACHINES LOURDES, SECTION LOCALE 115,
AGENT NEGOCIEATEUR ACCREDITE/PARTIE
INTERESSEE.

Dossiers du Conseil: 555-2981
555-2996
555-3024
530-1738

No. de Décision: 797

Cette décision traite de la
rationalisation de la structure des
unités de négociation chez Air B.C.
et fait suite à trois demandes
d'accréditation présentées par
l'Association des pilotes, l'ACRV et
le syndicat des Teamsters qui visaient
à morceler les deux unités de
négociation existantes représentées
par la Fraternité des cheminots et
visées par une seule convention
collective pour former des unités de
négociation qui se restreindraient à
certains groupes professionnels
d'employés.

Le Conseil a accepté la fragmentation
des unités de négociation existantes
bien qu'une telle fragmentation aille
à l'encontre de la tendance à élargir
les unités. Le Conseil a jugé qu'une
structure de cinq unités de
négociation chez Air B.C. était
appropriée et qu'elle reflétait la
pratique qui s'est développée dans le
secteur aérien, fondée principalement
sur les communautés d'intérêts
différentes des divers groupes
professionnels dans ce secteur.



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Reasons for decision

Canadian Air Line Pilots'
Association,

applicant,

Canadian Air Line Dispatchers'
Association,

applicant,

Western Canada Council of
Teamsters,

applicant,

Air B.C.

employer,

Canadian Brotherhood of
Railway, Transport and General
Workers,

*certified bargaining
agent/intervenor,*

and

International Union of
Operating Engineers, Local 115,

*certified bargaining agent/
interested party.*

Board Files: 555-2981
555-2996
555-3024
530-1738

The Board was composed of Vice-Chairman Hugh R.
Jamieson and Members Linda M. Parsons and Calvin B.
Davis.

The reasons for this decision were written by Vice-
Chairman Hugh R. Jamieson.

Appearances:

John T. Keenan and Lila Stermer, for the Canadian Air
Line Pilots' Association;

James Nyman, for the Canadian Air Lines Dispatchers'
Association;

Murray D. McGown, for the Western Canada Council of
Teamsters;

Michael A. Coady, for Air B.C.;
Bruce Laughton, for the Canadian Brotherhood of Railway,
Transport and General Workers; and
Robert Pেকেles, for the International Union of Operating
Engineers, Local 115.

I

These reasons deal primarily with three applications for certification and to a lesser extent with one application for review, all of which affect the configuration of the collective bargaining units at Air B.C. At the time of the filing of these applications the employees at Air B.C. were divided into three bargaining units. One unit composed of aircraft maintenance and ramp employees was represented by the International Union of Operating Engineers, Local 115 (the IUOE). This unit was covered by a single collective agreement. The other two bargaining units were represented by the Canadian Brotherhood of Railway, Transport and General Workers (the CBRT & GW). One of these units included both pilots and flight attendants and the other unit was a customer services unit which included reservations, customer service agents and dispatchers. These two bargaining units were covered by a single collective agreement.

On August 2, 1989 the Canadian Air Line Pilots' Association (CALPA) filed an application for certification (Board file 555-2981) seeking to represent a bargaining unit of pilots employed by Air B.C.

On August 28, 1989 the Canadian Air Line Dispatchers' Association (CALDA) filed an application for certification (Board file 555-2996) seeking to represent a bargaining unit of dispatchers employed at Air B.C.

These two applications came on top of an application for review which had been pending before the Board since May 23, 1989 (Board file 530-1738). This application came from Air B.C. following a work jurisdiction dispute between the IUOE and the CBRT & GW over some ramp functions at Victoria and Nanaimo.

Finally, on October 24, 1989 the Western Canada Council of Teamsters filed an application for certification (Board file 555-3024) seeking to represent a bargaining unit of flight attendants employed at Air B.C.

Taking into account all of the exchanges between the parties in the foregoing applications and, being aware that Air B.C. had gone through a period of rapid expansion during the past two or three years, the Board took the opportunity to have an overview of Air B.C.'s operations, administration and its collective bargaining regimes with a view to rationalizing the bargaining unit structures to reflect the realities of collective bargaining in today's airline industry.

Public hearings were held at Vancouver on February 5-8, 1990 and also on March 5-8, 1990. Notices were posted informing the employees of the applications which were filed with the Board as well as the hearings before the Board and the purpose thereof. Several written submissions were received from employees in response to these notices.

Following consideration of all of the material before it and of the evidence and argument heard, the Board decided that it is appropriate for there to be a five (5) bargaining unit structure at Air B.C. On April 3, 1990 the parties were notified of the Board's decision as follows:

"Following the hearing held in Vancouver from February 5 to 8 and from March 5 to 8, 1990 in the above-cited applications, the quorum of the Board comprised of Vice-Chairman Hugh R. Jamieson and Members Linda M. Parsons and Calvin B. Davis has rendered its decision in this matter.

The Board has concluded that it is appropriate for there to be a five (5) bargaining unit structure at Air B.C. These units will be:

- (1) a pilots bargaining unit
- (2) a flight attendants bargaining unit
- (3) a dispatchers bargaining unit
- (4) a maintenance bargaining unit
- (5) a customer service bargaining unit

To select a bargaining agent, the Board has ordered that representation votes be taken to determine which trade union the employees in the pilots unit, the flight attendants unit and the dispatchers unit wish to have as their representative for the purposes of collective bargaining. The names of the trade unions which will appear on the ballots will be:

- (1) the pilots unit.... CBRT & GW and CALPA
- (2) the flight attendants unit.... CBRT & GW and Western Canada Council of Teamsters
- (3) the dispatchers unit.... CBRT & GW and CALDA

The applications by CALPA, the Teamsters and CALDA affecting these three bargaining units are, in reality 'raid' situations; therefore, the rule about raiding unions taking over the existing units is applicable. Accordingly, the voting constituency for each unit will be those employees who were previously in the units represented by the CBRT & GW and who were employed as of Friday's date, March 30, 1990.

Once the bargaining agents have been selected, the Board will then deal with the issue of the exclusions requested by Air B.C. in each of the bargaining units.

There is no need to select a bargaining agent for the maintenance bargaining unit. The IUOE is the certified agent for this unit and it will continue to be so.

The customer service unit will continue to be represented by the CBRT & GW. This unit will be all those employees previously represented by the CBRT & GW less the pilots, flight attendants and dispatchers."

The following is the Board's rationale for arriving at the foregoing conclusions.

II

It goes without saying that bargaining unit construction is fundamental to sound labour relations. Bargaining unit determination is one of the most important and constructive functions of a labour relations board. An unwise unit determination may result in labour relations frictions between an employer and a trade union or between two or more trade unions or even between a trade union and the employees and it may, at the end of the day, put the employer out of business or the employees out of work. In this context, an appropriate bargaining unit will be one that, in collective bargaining, will best serve the interests of the employees and the enterprise in which they are employed, and will promote industrial stability in labour relations.

When approaching bargaining unit determination the Board must have regard for certain objectives which form the cornerstone of the Canada Labour Code (Part I - Industrial Relations) (previously Part V). These objectives can be summarized as:

- (1) Encouragement of free collective bargaining: In keeping with the objectives of the Code as contained in the "Preamble", the Board must encourage free collective bargaining as a means of offering employees a countervailing power to that of the employer in setting the terms and conditions of employment. To this end, the provisions of the Code facilitate the organization of workers into bargaining units which are represented by trade unions as the exclusive bargaining agent.

- (2) Fostering of industrial stability: The Board must foster industrial peace and stability through the establishment of a viable and potentially permanent framework for collective bargaining while maintaining a realistic balance of power between the parties.
- (3) Respect for the wishes of the employees: The Board must respect the right of employees to freely join the trade union of their choice.

Part of the Board's task is to attach such priority to the foregoing objectives as the circumstances demand and to:

"assess and weigh these competing statutory policies and it will often have to make delicate choices in order to achieve the best compromises in complex labour relations situations."

(Boston Bar Lumber and Timber Workers' Association,
[1976] 2 Can LRBR 380 at page 391 (BCLRB))

The importance to be given to all of these considerations will depend largely on what type of situation is involved; i.e., whether the Board is faced with an initial certification, a review of existing bargaining units, a raid, etc.

In the instant case, we are faced with both a raid situation, or a partial raid is probably more accurate, and a review situation which, although prompted by the certification applications by CALPA, CALDA and the Teamsters, was enlarged upon by the Board on its own motion to include the overall bargaining unit structures at Air B.C.

In this type of situation the Board is mindful that any redefinition of bargaining unit configurations will result in a redistribution of collective bargaining power. Obviously, such a

redistribution will cause those who have benefited from the existing pattern to argue forcefully for its retention. This was certainly the case here with Air B.C. vigorously opposing any change to the status quo. It would obviously be to the employer's advantage to keep the bargaining power of the pilots, flight attendants and dispatchers diluted within the ranks of the larger unit. On the other hand, the employees in these occupational groups are no longer content to remain in the CBRT & GW's bargaining unit where they feel that their specific needs and demands are lost to the needs of the other groups which are the majority of those affected by the single collective agreement. To make matters worse, it is common in this industry for these occupational groups to have their own separate bargaining units, at least in the major airlines this is so, and it is therefore difficult for these groups at Air B.C. to understand why their applications are being opposed so strongly.

Obviously, the Board's dilemma here was to decide whether to allow the fragmentation of an existing collective bargaining structure which is really to go against the trend and the stated preference for broader-based bargaining. In almost every labour relations jurisdiction across the country, fragmentation of an existing bargaining unit is not permitted except where there are strong compelling reasons for so doing. One of the leading decisions of this Board in this regard is Trade of Locomotive Engineers and Canadian Pacific Limited et al. (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59). In this case the Board adopted the statements of the British Columbia Labour Relations Board in Insurance Corporation of British Columbia and Canadian Union of Public Employees Local 1695 et al., [1974] 1 Can LRBR 403, which stand for the proposition that labour relations (particularly from a management point of view) are better served by larger if not single all-employee bargaining units:

"(i) There is in the single overall bargaining unit, administration efficiency and convenience in bargaining.

'All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units.'"

(Trade of Locomotive Engineers et al., supra, at page 366)

All of the factors which the Board discussed in that decision favouring the creation and maintenance of larger bargaining units can be summarized as follows:

- (1) **Administrative efficiency and convenience in bargaining:** especially where there is a high degree of centralization in the management process;
- (2) **Lateral mobility of the employees:** This will be enhanced by a single bargaining unit and thus improve job security;
- (3) **Common framework of employment conditions:** By vesting the union with greater bargaining power, a single unit will make a common framework of employment conditions easier to attain;
- (4) **Industrial stability:** the risk of strikes will be less if there is one union and one set of negotiations.

All of the aforesaid notwithstanding, the Board's preference for larger or all-employee bargaining units must not be equated to a presumption in favour of such bargaining units. This was specifically pointed out in Alberta Government Telephones Commission (1989), CLRB no. 726 at page 16:

"It is not our view that there is a specific presumption in favour of all-employee bargaining units. Under particular circumstances, the facts of the situation may warrant such being the result, but the nature of determining appropriate bargaining units is such that there must be a dependency on the facts and situation of each case. Therefore, whereas there may have been, in some cases, the statement on the part of the Board that there is a preference for such a bargaining unit, we cannot conclude that a statement of preference can be equated to a presumption."

For example, in Canadian Imperial Bank of Commerce (Victory Square Branch) (1977), 20 di 319; [1977] 2 Can LRBR 99; and 77 CLLC 16,089 (CLRB no. 90) the Board also recognized administrative convenience, lateral mobility of employees, and the desirability of common terms of employment as factors leading to the finding of a larger bargaining unit as the more appropriate one. However, as that case involved an initial certification, the Board nevertheless certified a bargaining unit covering employees of single branches location of the bank in order to safeguard the employees' right to group in self-determined units. (see also Purolator Courier Ltd. (1989), unreported Board decision no. 730, wherein the Board fragmented an employer's nationwide organizational structure to certify a small unit of employees located at Windsor and Chatham, Ontario).

On the opposite end of the spectrum, the Board has used the principles enunciated in the Trade of Locomotive Engineers et al., supra, to justify the restructuring and consolidation of existing bargaining units notwithstanding the expressed wishes of the affected employees to the contrary. These types of situations have arisen mainly where there have been changes in circumstances because of things like corporate mergers, sales of businesses, changes to internal corporate organizational structures and also where government departments have been converted into crown corporations. Some examples of this can be found in Seaspan International Ltd. (1979), 33 di 544; and [1979]

2 Can LRBR 493 (CLRB no. 196); National Harbours Board (1983), 52 di 34 (CLRB no. 414); Canadian National Railway Company (1984), 56 di 137 (CLRB no. 468); Canadian Pacific Limited (1984), 57 di 112; 8 CLRBR (NS) 378; and 84 CLLC 16,060 (CLRB no. 482); Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661); and Canada Post Corporation (1988), 19 CLRBR (NS) 129 (CLRB no. 675).

There are many other decisions of this Board and of other Boards which can be cited to support the concept of larger bargaining units and broader-based bargaining. There are few in support of fragmentation of existing units. We do not intend to analyze or attempt to differentiate between all of the cases which the parties referred us to; suffice it to say that we have taken notice of everything that was put before us. However, in spite of the weight of the jurisprudence and other writings favouring the concept of broader-based bargaining, many of which are very scholarly to say the least, the fact remains that the determination of appropriate bargaining units is not a question of law, it is a factual determination that is dependent upon the particular facts and circumstances of each case. The most important consideration being the community of interests of the employee groups. Accordingly, notwithstanding the apparent persuasiveness of the preponderance of jurisprudence against fragmentation, this panel of the Board concludes that it is in the best interests of labour relations at Air B.C. to establish a bargaining unit pattern which reflects the practice in the airline industry. This pattern will, in our respectful opinion, best balance the powers of the employer with the powers of the various occupational groups of employees who will be able to bargain directly with their employer about their specific community interests. It also takes into account, in an indirect way, the wishes of the employees which is fundamental to the whole spirit of the Code.

III

Before dealing further with the community of interest concept, let us briefly outline what has been this Board's approach to collective bargaining units in the airline industry.

Generally speaking, depending on the size of the airline, (i.e., national, regional, etc.) the board has indicated over the years that the larger the employer, the more likely the bargaining units would be specialized. Conversely, the smaller the airline the more likely it would be that the employees would be included in single or larger multi-skill bargaining units. (see Victoria Flying Services Ltd. (1977), 23 di 13; and 77 CLLC 16,072 (CLRB no. 74); and General Aviation Services Limited (1979), 34 di 791; and [1979] 2 Can LRBR 98 (CLRB no. 182)).

There is really no set rule when it comes to bargaining unit configurations in smaller airlines, it is the prevailing circumstances that will dictate the Board's response. For example, in an unorganized airline any single occupational group could be found to be appropriate in order to provide a realistic opportunity for the employees to exercise their rights under the Code to participate in collective bargaining. This Board has made it clear that it will not insist on rigid bargaining unit criteria or apply artificial or unnecessary bargaining unit restrictions which could frustrate the attempts of employees to organize themselves collectively for the purposes of the Code only because a lesser bargaining unit might inconvenience an employer (see Purolator Courier Ltd., supra; and also Sedpex Inc. (1985), 63 di 102 (CLRB no. 543)).

In reality, depending on the circumstances, in a small airline any combination of occupational groups is possible. Any combination of pilots, flight attendants, dispatchers, maintenance, reservations, ramp and baggage handlers, etc. can form an appropriate unit. However, when numbers of employees warrant it the Board will divide some of these groups into separate units. The key consideration being divergent community of interest. As well, where possible the Board prefers to create company-wide units in the airline industry as opposed to single location units which are popular in other industries in the federal jurisdiction such as broadcasting, longshoring and, to a certain extent, in the trucking industry.

To illustrate the results of the implementation of these policies, let us review some of the Board's published decisions which contain references to the overall bargaining unit structure at some of Canada's major airlines. We appreciate that these descriptions are of course as of the date of the particular decision, however, they are still useful to illustrate the bargaining unit trends in the industry.

In Air Canada (1980), 42 di 114; and [1981] 2 Can LRBR 153 (CLRB no. 277), wherein incidently, the Board refused to fragment a group of aircraft maintenance personnel from a nationwide bargaining unit, the bargaining unit structures at Air Canada were described as:

| <u>"Description of Employee Group</u> | <u>Number of Employees</u> | <u>Name of Union</u> |
|-------------------------------------------|--------------------------------|-------------------------------------------------|
| 1. Pilots | 1,537 | Canadian Air Line Pilots Association |
| 2. Flight Attendants | 2,602 | Canadian Air Line Flight Attendants Association |
| 3. Flight Dispatchers | 56 | Canadian Air Line Dispatchers Association |

| | | |
|-------------------------------------------------------------------------------------------|--------------------|--------------------------------------------------------------------|
| 4. Customer Service Branch Employees -- Passenger Agents & Communications AGents | 2,444 + 366 P/T | Canadian Air Line Employees Association |
| 5. Employees of the Maintenance, Customer Service & Purchasing & Supply Branches | 7,325 | International Association of Machinists & Aerospace Workers |
| 6. Winnipeg Finance Branch Clerical Employees | 548 | International Association of Machinists & Aerospace Workers |
| 7. Cafeteria Workers | 40 | International Association of Machinists & Aerospace Workers |
| 8. Printing Bureau Employees | 23 | International Association of Machinists & Aerospace Workers" |

In Québecair (1978), 33 di 480; and [1979] 3 Can LRBR 550 (CLRB no. 163), the Board certified a trade union for a separate "supervisory" bargaining unit. At the time the following other bargaining units were in existence at Québecair:

-A unit of several classifications of employees working in the traffic, maintenance, operations and crew dispatcher departments.

-A unit of pilots and co-pilots.

-A unit of stewardesses and flight attendants.

-A unit of clerical and technical employees in the accounting, administration and maintenance departments.

-A unit of flight engineers.

In a subsequent case affecting Québecair in 1983 the Board was asked to redefine the bargaining units following the merger of a

small airline (Régionair) with the larger one (Québecair) and the subsequent intermingling of employees. The Board declared that the four units previously in existence at the larger airline and their bargaining agent should remain and that the unionized employees of the smaller airline should be added to them.

In Wardair Canada (1975) Ltd. (1978), 32 di 248; and [1979] 1 Can LRBR 49 (CLRB no. 155) the Board described the existing bargaining unit structures at Wardair:

-A unit of Wardair's flight crew (approximately 150 employees) consisting of a pilot, first officer and flight engineer which were not represented by CALPA but by an independent union, the Air Crew Association of Canada.

-A unit of maintenance employees (approximately 450) which were represented by the IAM.

-A unit of the passenger service agents (approximately 250) which were represented by the independent Canadian Association of Passenger Agents (CAPA).

-A unit of the reservations clerks which were provincially certified.

-A unit of approximately 150 reservations clerks in Alberta which were represented by CAPA while approximately 70 in British Columbia who were represented by the BRAC.

-A unit of approximately 500 sales, accounting and reservations employees in Ontario which were not represented by any union.

-A unit of flight attendants (approximately 400) which were represented by CALFAA.

More recently, following a merger of Wardair and Canadian International Air Lines (CAIL) the Board has issued certification orders for separate units of pilots, flight attendants, and also for reservations and customer service agents. In addition to those units, there are at least three other separate units at CAIL, namely dispatchers, technical employees (maintenance) and office employees. At the present time the management at CAIL and representatives of the trade unions there are working together with the Board to resolve some issues affecting several "tag-end" groups of employees.

In addition to the foregoing information relating to industry practice, CALPA, CALDA and the Teamsters filed documents to show that they represent separate bargaining units in their respective occupational groups at other airlines across Canada. We see no need to list them because they simply follow the trend which is clearly set out in the examples we have given, particularly insofar as pilots and flight attendants are concerned.

Dispatchers are somewhat different in that in many of the smaller airlines, dispatchers do not exist. If they do, they will only be in ones and twos. In those airlines, dispatchers are either unorganized or they will be included with other employees like the dispatchers at Air B.C. have been until now. We shall deal in more detail with the evolution of the dispatcher's unit when we discuss the community of interest issues.

In the meantime, it can be seen from the foregoing that whether this Board intended it to be so or not, a definite bargaining unit pattern has evolved in the airline industry. This sort of

evolution is, in our respectful opinion, exactly what was envisaged by the Woods Task Force in 1968 when it made its recommendations to Parliament, which recommendations later formed the basis of the Code as we know it today. Particularly relevant to this case is recommendation no. 451:

"451. We agree with the discretionary power now reposing in the Canada Labour Relations Board. We wish, however, to see collective bargaining liberated from any rigid bargaining unit patterns, in order that the system may be assisted to find its own level according to the interests of the parties. In contrast to the conglomerate of comparatively small units which prevail in many industries, we favour accessibility to wider bargaining units, company-wide units, multi-plant units, multi-employer units, multi-union units, and industrial as distinct from craft units in industrial plants. Similarly, where sound industrial relations call for a narrowing of units, the procedure for determining and redetermining bargaining units should be such as to facilitate that adoption."

(Canadian Industrial Relations: The Report of Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968) (Chair: H.D. Woods) at page 142; emphasis added)

We acknowledge that even in this recommendation there was a preference expressed for wider-based bargaining units, multi-employer bargaining units and so on; however, we also note that the aversion expressed to the existence of craft units was confined to industrial plants.

Here we are not dealing with an industrial plant, where we agree that craft units are not appropriate. (See Atomic Energy of Canada Ltd. (1977), 25 di 377; [1978] 1 Can LRBR 92; and 78 CLLC 16,128 (CLRB no. 107) for the Board's policy in this regard.)

What we have before us is an employer whose operations spread across western Canada and into the United States. These operations require a multi-skilled, multi-located workforce which naturally attracts employees with divergent skills, training and employment expectations. As we shall explain later, even the fact that some employees fly and others do not adds to community

of interest differences which are not so apparent amongst occupational groups in single plant or industrial settings such as are found predominately in the provincial scene. This is what makes bargaining unit construction in the federal jurisdiction so unique and what makes it inadvisable at times for this Board to readily accept some principles of bargaining unit appropriateness which are more or less taken for granted in other jurisdictions. This is why we say that the accommodation of divergent communities of interest amongst employee groups is surely one of the major considerations that the Woods Task Force had in mind when it favoured "letting the system find its own level according to the interests of the parties" and why it recommended procedures which would facilitate the adoption of narrower bargaining units where they are called for.

Divergent community of interest was one of the major considerations discussed by the Board in the Trade of Locomotive Engineers et al. decision as one possible compelling reason to justify fragmentation. In that case the Board denied the application to fragment because in its view none of the criteria permitting fragmentation were present. This is not surprising when one considers that what the Board had before it was a group of engineers located in the Pacific Region of CP Rail who wished to carve out a separate engineers unit from an existing company-wide unit.

In this case, both Air B.C. and the CBRT & GW placed considerable weight on the anti-fragmentation principles adopted by the Board in that decision. What they seemed to have missed though was the overall bargaining unit structure at CP Rail at that time. Not only was there an engineers unit which was represented by the Brotherhood of Locomotive Engineers that was the focus of the application, there were, and still are today for that matter, at least nine or ten other bargaining units at CP Rail. These would

include the trainmen and yardmen represented by the United Transportation Union; the track maintenance unit represented by the Maintenance of Way Employees Union; the large clerical and ticket agents unit represented by the CBRT & GW; and at least six other shopcraft units represented by the various craft unions. That was the status quo that the Board was maintaining by its decision in the Trade of Locomotive Engineers et al. decision. At CP Rail, it was at the time, and still is, an employer's workforce that is fragmented in accordance with the patterns that had evolved over almost a century of collective bargaining in the railway industry. That is not unlike what this panel of the Board is being asked to recognize here. We are being asked by the employees to legitimize the bargaining unit pattern which has evolved in the airline industry.

IV

We shall now turn to the differences in the community of interest amongst these employee groups which have persuaded us to follow industry practice and to include them in a separate occupationally defined bargaining unit. Also, we will touch briefly upon the wishes of the employees and the impact this had in persuading us to reach the conclusions which we did.

Let us start by noting that Air B.C. has, over the last few years, become the third largest regional air carrier in Canada. It has grown over the last eight or more years from a 150-employee company to somewhere between 800 and 900 strong. Air B.C. now operates larger and more sophisticated aircraft, including jets and its routes reach all across western Canada and into the U.S.A. In addition to its scheduled runs, Air B.C. also does charter flights.

Pilots:

Within that context we shall deal first with the pilots. Air B.C. is primarily a pilot dispatched airline. This basically means that the ultimate decisions to fly to or to land at a given destination rests with the pilots. The qualifications, training and skills of the pilots are unique to them and there is no interchangeability of duties and no cross-utilization of pilots to do any other function or to work with any other employee group at Air B.C. There is therefore no possibility of transfer or of promotion for anyone in the company to a position of a pilot unless the individual qualifies which involves many years of training. In short, there is no mobility between pilots and the other employee groups.

Within Air B.C.'s organizational structures pilots fall within the flight operations department. They are a hierarchy unto themselves with supervision, training and the likes being carried out by fellow pilots. There is also a special method of determining pilots' salaries since they are paid different rates depending on the type of aircraft they fly. In the same vein, their scale of earnings is much higher than other employee groups.

Because of the nature and stresses in their work, the responsibility, hours of work, locations of work, etc., pilots have special concerns and needs that are totally unrelated to other jobs at Air B.C. These interests and needs have been recognized by Air B.C. and the CBRT & GW in that a separate division and a separate letter of understanding has been negotiated for the pilots as part of the current collective agreement.

Taking all of these things into consideration, it is clear that the pilots enjoy a community of interest that sets them apart from the other groups.

Flight Attendants:

Like the pilots, flight attendants are part of Air B.C.'s flight operations department. While the flight attendants also fly, their training is significantly different from that of the pilots. In the course of a flight, the flight attendants' responsibilities are not only different from those of the pilots but they give rise to special concerns that need to be specifically addressed at the bargaining table. For example, flight attendants are generally alone with the passengers in a cabin and must deal with any problem on an individual basis. They can rarely sit down throughout the flight and must handle any emergency situation that arises. The life of a flight attendant was described by the Board in Wardair Canada (1975) Ltd. (1983), 53 di 26 at pages 31-32.

"The life of a flight attendant is one of irregular and compressed work periods. Whether on a scheduled or chartered airline, flight attendants periodically receive work assignments for the immediate future which will take them away from home. The flight attendant goes to work on an assigned set of flights during any work period. He or she may work for months without going to the employer's offices. The pattern will be from home to airport to airport to hotel to airport and so on to home ...

This is not the world of nine to five. Nor is it a world like that of a stevedore or construction worker and their hiring halls. This is literally the world linked by telephones, mail, notices on bulletin boards, manuals on everything and a union that ties widely dispersed employees to their employer through negotiated rules, union-management committee discussion and procedures for redress of perceived rule infractions. The employer's crew scheduling department and the union's crew scheduling committee are the vehicles for operating this complex world of seasonal pairings, blocks, bidding and awarding blocks, minimum and maximum duty periods, deadheading, rest periods, vacation credits, guaranteed days off, standby, drafting, trip exchanges, and so on.

While away from duty, a flight attendant may live in any province, in the city or country and may have a life pattern out of rhythm with most others, even shift workers."

This description applies equally to the flight attendants at Air B.C. There is no similarity of duties between flight attendants

and the ground crews at Air B.C. The hours of work and the method of payment are quite different. Also, there is no interchangeability between flight attendants and other groups either on a day-to-day basis or in the context of transfers or promotions.

When the flight attendants were included in the pilots' certification order in 1984, there were only a handful of them. Today there is a cohesive and viable group of 150. All of these factors convince us that the flight attendants, like the pilots, enjoy a community of interest that is quite distinct from that of the other groups.

Dispatchers:

The uniqueness of the dispatchers appears at first less obvious than that of the pilots and the flight attendants. The dispatch functions are directly tied to flight safety. They include flight watch, i.e. monitoring information relevant to air safety during the course of a flight and relaying that information to the pilot of an aircraft during a flight and establishing flight plans that account for a wide variety of factors having direct bearing on safety such as weather conditions, fuel loading and runway conditions. Other factors considered in flight planning include efficiency and economy in the movement of flight.

In the performance of their functions, the dispatchers must maintain a thorough knowledge of the serviceability of airports, landing strips, airways, and navigational aids used by the company. They must undergo a special training and remain qualified as required by the Air Navigation Orders, Series VII, number 2, Section 15.

Dispatchers must also maintain a co-operative relationship with flight captains and with reservations, maintenance, engineering and other company departments in the interest of safety, efficiency and economy. However, some decisions made by dispatchers may be in conflict with the objectives of these other departments.

In 1981, when they were included in the CBRT & GW's bargaining unit, the dispatchers performed various non-specialized functions. They were considered as "jacks of all trades". Accordingly, they were rightly held as not enjoying a distinct community of interest. Following the considerable growth of the company since that time the dispatchers' functions have changed significantly. These functions are now clearly distinct from those performed by any other group of employees. Air B.C. dispatchers are now "true dispatchers" in the sense that they perform the same functions as other dispatchers in the airline industry. The corporate organizational structure further confirms this evolution since the dispatchers are now part of the flight operations department of the company.

This new reality surrounding the functions and duties of the dispatcher is simply recognition that dispatchers now share a greater community of interest with those involved in flight operations rather than the other groups with whom they were previously grouped with for collective bargaining purposes. However, there is a distinct difference between pilots and flight attendants and dispatchers vis-à-vis their working conditions, i.e., flying as opposed to non-flying, schedules, location of employment, method of calculating earnings, and so on. These differences dictate that dispatchers ought not to be included with either of these two other groups. Accordingly, for all of the foregoing considerations and, because the dispatcher functions at Air B.C. have now reached a stage where these

employees have developed a community of interest of their own, we are prepared to include them in a separate bargaining unit.

This leaves only the maintenance unit which is represented by the IUOE, and the remainder of the CBRT & GW bargaining unit which basically covers customer service agents.

Maintenance:

For the maintenance unit, we must admit that at one stage in these proceedings the Board was looking at the possibility of merging all of the ground personnel into a single unit. However, in all of the written submissions and throughout the hearings, no party took any exception to the continuance of the maintenance bargaining unit. In fact, to the contrary, the majority of the parties urged the Board not to disturb the status quo of the IUOE unit. The Board takes heed of those requests and finds that in the circumstances before us the existing maintenance and ramp employee bargaining unit is appropriate and that the IUOE shall remain as the bargaining agent.

Customer Service Agents:

As for the remainder, the customer service group, these employees shall form a separate bargaining unit which shall continue to be represented by the CBRT & GW.

A few words about the wishes of employees. In the written submissions of the parties and also during the hearing there were references to the wishes of the employees and how these should affect the determination of the appropriateness of the bargaining units. Generally speaking, the three applicant unions, CALPA,

CALDA, and the Teamsters submitted that the expression of wishes by the affected employees should be taken into account by the Board when shaping the bargaining units. Air B.C. and the CBRT & GW argued against this notion saying that wishes were primarily to select a bargaining agent, not to determine appropriateness. To some extent both arguments are correct.

The right of employees to join a trade union of their choice and to participate in collective bargaining through their chosen agent is at the very core of the Code:

"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."

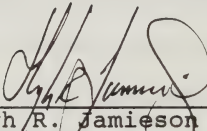
These rights are, however, fettered by the Board's exclusive powers to determine the shape and size of bargaining units. (see Canadian Pacific Limited, supra). In theory the Board is supposed to determine the appropriate grouping of employees and then turn its mind to which trade union the employees in this determined group wish to have as their bargaining agent. In practice, however, there is usually an expression of wishes before the Board by way of union membership cards when it is determining the appropriateness of the bargaining unit for which the union has applied. Without this expression of wishes the trade union could not make its application. This is particularly so in raid situations like we have here where each of the applicant trade unions had to ensure that they had signed up more than 50% of the employees in the bargaining unit they were seeking to represent. If that 50 + 1 is not there, the application does not get off the ground. (see Canadian Pacific Express and Transport Ltd. (1988), unreported CLRB no. 682). In these circumstances the Board, and all of the parties for that matter, were well aware throughout these proceedings that in a *prima facie* way at least, a majority of the pilots, flight

attendants and dispatchers had expressed their wishes to rid themselves of the CBRT & GW as their bargaining agent. Of course the specifics of who signed union cards and when is confidential to the Board under section 28 of the Board's Regulations. We used the term "in a prima facie way" because the Board rarely accepts union membership cards as a final expression of wishes in a raid situation. This would only occur for example where the incumbent bargaining agent did not oppose the raid application. Normally, the Board satisfies itself of the wishes of the employees in a raid situation by way of a representation vote just as it has done here.

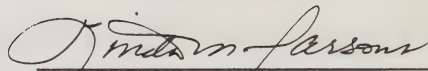
It can be seen therefore that the prima facie expression of wishes in a raid situation is not determinative of anything, it is only a sign that there is a malaise in the collective bargaining regime. An indication of employee dissatisfaction with their bargaining agent. As we have seen here by the evidence adduced at the hearing that such dissatisfaction is likely to affect the employees' attitude not only towards their bargaining agent but also towards their employer from whom they consider they are not receiving their just rewards in return for their labour. This is hardly conducive to peaceful and stable labour relations. As the circumstances unfolded before us one could feel the intensity of this dissatisfaction and unrest which, in our respectful opinion, cannot be resolved within the framework of collective bargaining which presently exists at Air B.C. The underlying problem is simply that Air B.C. and its employees have outgrown the bargaining structures which have existed since the early 1980's. The first step to recovery is to build a new foundation by restructuring the bargaining units which we have done. In so doing we feel that we have achieved the three objectives referred to at the outset of these reasons; namely:

- (1) The encouragement of free collective bargaining. This we have done by redistributing the collective bargaining power to make it more meaningful for the employees;
- (2) Fostering of industrial peace. This is achieved by the restructuring of the bargaining units to make them more viable and thus potentially more permanent; and
- (3) Respect for the wishes of the employees. As we said, while they were not determinative, the wishes of the employees did have a bearing on the outcome of these proceedings and, by ordering a representation vote in three of the bargaining units, the employee wishes have been respected.

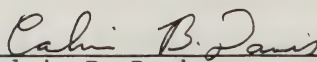
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chairman



Linda M. Parsons
Board Member



Calvin B. Davis
Board Member

DATED at Ottawa this 18th day of May, 1990.

Lacking No. 798

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Summary

Résumé de décision

KEVIN EVANS ET AL., APPLICANTS AND
NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS,
BARGAINING AGENT, AND VTR
PRODUCTIONS LIMITED, EMPLOYER.

KEVIN EVANS ET AUTRES, REQUÉRANTS,
ET ASSOCIATION NATIONALE DES
EMPLOYÉS ET TECHNICIENS EN
RADIODIFFUSION, AGENT NÉGOCIATEUR
ET VTR PRODUCTIONS LIMITED,
EMPLOYEUR.

Board File: 565-375

Dossier du Conseil: 565-375

Decision No.: 799

N° de Décision: 799

Application for revocation pursuant
to section 38(1) of the Canada
Labour Code (Part I - Industrial
Relations). Constitutional
jurisdiction over employer
challenged by incumbent union.
Employer involved in video and
sound production but not himself
a broadcaster. Certification
dating back to 1963.

Demande de révocation présentée en
vertu du paragraphe 38(1) du Code
canadien du travail (Partie I -
Relations du travail). Le syndicat
accrédité a contesté la demande en
invoquant que l'employeur n'était
plus sous juridiction fédérale.
L'employeur est une entreprise de
production de documents audio-
visuels mais n'est pas lui-même un
radio-diffuseur. L'accréditation
du syndicat remontait à 1963.

The Board followed the decision
rendered by the Supreme Court in
Paul Langlais and those rendered
by the Board in CBC and Shamrock.
The employer was found not to be
under federal jurisdiction.
Consequently, the Board could not
entertain the merits of the
application for revocation which
was accordingly dismissed.

Le Conseil a appliqué l'arrêt de
la Cour suprême rendu dans
l'affaire Paul Langlais et aussi
ses propres décisions Radio-Canada
et Shamrock. Le Conseil a déclaré
que l'employeur ne relevait pas de
la compétence fédérale.
Conséquemment, le Conseil a refusé
de statuer sur le fond de la
demande en révocation et l'a
rejetée.

However, in view of its lack of
constitutional jurisdiction,
relying on section 18 of the Code,
the Board rescinded the
certification certificate.

Cependant, en raison de l'absence
de compétence constitutionnelle,
le Conseil s'est prévalu de
l'article 18 du Code et a prononcé
l'annulation du certificat
d'accréditation.



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Reasons for Decision

Kevin Evans et al.

applicants,

and

National Association of
Broadcast Employees and
Technicians,

bargaining agent,

and

VTR Productions Limited

employer.

Board File: 565-375

The panel was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. Calvin B. Davis and Robert Cadieux, Members.

These reasons for decision were written by Mr. Serge Brault.

Counsel or representative on record:

Mr. Christopher C.E. Eames, for the applicant;

Mr. Harold F. Caley, for the union; and

Mr. K. Bruce Grant, for the employer.

I

THE PROCEDURES

On December 6, 1989, Mr. Kevin Evans applied to this Board, pursuant to section 38(1) of the Canada Labour Code (Part I - Industrial Relations), for an order revoking a July 10, 1963 certification granted to the National Association of Broadcast Employees and Technicians ("NABET") for a group of employees of VTR Productions Limited ("VTR"). Section 38(1) states:

"38.(1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union."

A list of employees who supported the revocation accompanied the application.

Upon the filing of Mr. Evans' revocation application, NABET argued that VTR was no longer within the constitutional jurisdiction of this Board. For its part, VTR challenged that position, arguing it is still a federal undertaking.

In addition, NABET maintained that Mr. Kevin Evans was a member of management and thus not an employee within the meaning of section 3(1). It is clear from the text of section 38(1), that only an employee may apply to this Board for revocation of a certification.

After having considered the report initially filed by the Board's investigating officer, our panel sought further information and submissions from the parties, particularly with respect to the constitutional issue. After having considered all the submissions filed, the Board found it could decide this matter in-camera, without a public hearing.

II

THE FACTS

Mr. Evans works for VTR, a company whose primary business involves video and sound production. VTR started business in 1959 and four years later was certified by this Board's predecessor (File number 766-1420). The certification was ostensibly issued because of the close connection between VTR and the Canadian Broadcasting Corporation ("CBC"). While one of the parties gave us a copy of the original 1963 transcript, no reasons for decision of the Board were ever issued. Consequently, the exact basis upon which the Board found that it had jurisdiction back in 1963 cannot be ascertained.

In 1980, VTR acquired another company, Eastern Sound, from Standard Broadcasting. VTR also operates a third entity, the Perfect Dub Company, which duplicates videos of programs and commercials for third parties. The three companies work in slightly different areas though all activities relate to third party broadcasting operations in the broadest sense of the term. VTR described its activities as follows in a letter to the Board dated May 3, 1990:

"VTR Productions and Eastern Sound act as broadcast sites. Sound Source is produced by the company at Eastern Sound, transmitted by telephone lines to a satellite up-link and broadcast to various radio stations across the country via satellite. The Easter Seals Telethon and Ontario Lottery Live (which airs live every Saturday night 10:30 p.m. to 11:00 p.m.) are transmitted by telephone lines to the CBC and T.V. Ontario respectively who in turn retransmit the programs to various affiliates across the country.

This is the identical process that was in place for transmission of both the Grey Cup Game and the soap opera Scarlett Hill at the time of certification in 1963.

While VTR Production and Eastern Sound do not have our own CRTC licenses to broadcast, (and never have had in our entire existence held a broadcast license) we continue to operate as a facilitator to the Broadcast industry and operate in the same capacity as a broadcaster."

The 1963 certification represented the only one ever issued by this Board for VTR. However, further bargaining relationships subject to our Code developed following the acquisition of Eastern Sound in 1980. In 1985, NABET organized the office employees of VTR Productions and the engineers in Eastern Sound. Mr. Evans was one of the workers affected because of his job with Eastern Sound. The company acknowledged NABET's status as bargaining agent pursuant to a voluntary recognition clause in the VTR January 1, 1986 collective agreement.

One allegation on which the parties differed in this matter concerned whether VTR itself regularly produced, broadcast or transmitted directly radio signals.

Mr. Evans' representative, by letter dated February 26, 1990, alleged that:

"...the Employer also regularly produces, broadcasts and transmits directly to a number of radio stations across the country the radio program 'Sound Source' as well as the direct broadcast and transmission to a number of T.V. stations across the country of the televised 'Easter Seals' program..."

NABET responded on March 12, 1990 and contradicted this allegation:

"VTR Productions/Eastern Sound do not 'produce, broadcast or transmit directly' as they do not have a CRTC license to broadcast and transmit programs, nor do they own a transmitter. VTR Productions/Eastern Sound provide studio space, equipment and technical personnel to outside producers who actually produce any productions

which may end up being broadcast by a CRTC licensed broadcaster. In respect to 'Sound Source', this is fed by telephone line to Radio Station 'Q107' who then broadcast it on their radio station."

The Board asked the parties to clarify whether VTR in effect did broadcast or transmit material over the air ways. VTR, in its May 3, 1990 letter cited in part above, clarified that it did not in fact broadcast, although its facilities were often used as broadcast sites by licensed broadcasters.

III

THE SUBMISSIONS

In the view of counsel for NABET, the operations at VTR have changed since 1963 and VTR no longer has a close connection and participation with the CBC. As mentioned previously, it would appear that VTR's close connection with CBC convinced our predecessors in 1963 that VTR also came under federal jurisdiction. NABET chose not to dispute the 1963 decision of this Board, but did maintain that the nature of the operations of the company had changed since 1963.

VTR argues that its operations have not changed since the 1963 certification and that it has actually increased its specific activities with the CBC, its largest customer. For example, not only has VTR in the past year participated in the CBC broadcasts of "The Jim Henson Hour" and "The Kids in the Hall," but it has also supplied video and sound post-production services on all CBC creative work for their on-air promotions. VTR similarly works with other national networks such as the CTV Television Network, Global TV, YTV and First Choice.

VTR maintains that its work for national broadcasters has increased rather than diminished since 1963.

Mr. Evans' representative, in reply to NABET's allegations, noted that VTR's operating format had not changed since 1963 and that this Board therefore retained its constitutional jurisdiction over VTR's activities. He also noted that Mr. Evans had been a member of the bargaining unit since the voluntary recognition for Eastern Sound employees went into effect in 1986. Consequently, Mr. Evans was an "employee", as that term is defined in the Code.

IV

THE DECISION

In 1983, the Supreme Court of Canada clarified the constitutional division of powers for the broadcasting industry in Canada Labour Relations Board v. Paul L'Anglais Inc. et al., [1983] 1 S.C.R. 147; (1983) 146 D.L.R. (3d) 202; and 83 CLLC 14,033. This case dealt with whether or not subsidiaries of a broadcasting undertaking which produce commercial and audio-visual material for television and sell broadcast air time are "broadcasting or radio communications undertakings."

The facts in Paul L'Anglais Inc. et al, supra, are significant for the determination of this case. The Court reproduced three facts that described J.P.L. Productions Inc's activities. J.P.L. was a producer of programs as opposed to a broadcaster. The three facts concerning J.P.L. Productions were as follows:

- "1. its activities are limited to the production of commercials and audio-visual programs;
2. it does not broadcast programs or commercials, and holds no license for that purpose;
3. the commercials and audio-visual programs it produces are the property of its customers and it is they who determine how they are used (that is, their broadcasting or other use);"

(pages 167; 217; and 12,151)

The Supreme Court of Canada further reproduced a passage of a letter describing J.P.L. Production's activities:

"[JPL]...is... essentially a production undertaking but ... in no way is it exclusively for CFTM-TV, since J.P.L. Productions Inc. produces commercials for institutional and private bodies as well as documentaries for the same customers; in addition, this company has obtained a contract to produce certain educational programs to be televised by the Quebec Department of Education."

(pages 167; 217; and 12,151)

The Court used these findings as the basis for its application of the standard test for deciding when an otherwise local undertaking becomes federal. In Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115; (1980), 98 D.L.R. (3d) 1; and (1979) 28 N.R. 107 Dickson J. set out a three stage test for such questions:

"First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The Court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as 'vital,' 'essential' or 'integral.' ..."

(pages 132; 14; and 125)

The Court applied this three stage test to the facts in Paul L'Angeais Inc. et al., supra:

"It is established that Télé-Métropole Inc., which operates CFTM-TV Channel 10, is a television broadcasting undertaking, and as such a federal work, undertaking or business over which the Board has jurisdiction. That disposes of the operation which is at the core of the federal undertaking.

Turning to the second stage, examining the nature of respondents' respective operations, I think it is sufficient to refer to the legislative definitions of 'broadcasting' and of 'radiocommunication' to see that the sale of time for sponsored programs and the production of programs and commercial messages broadcast by other persons are not activities falling within this field of federal jurisdiction. These definitions are to be found in s. 2 of the Broadcasting Act, R.S.C. 1970, c. B-11:

'broadcasting' means any radiocommunication in which the transmissions are intended for direct reception by the general public;

'radiocommunication' means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide;

Neither of the two respondents is concerned with the transmission, emission or reception of signs, signals, writing, images, sounds or intelligence.

Finally, the third stage: in my opinion the facts alleged do not show a 'vital', 'essential' or 'integral' relationship between the operation of Télé-Métropole Inc. and those of its subsidiaries."

(pages 168-169; 218; and 12,152; emphasis added)

The Court further noted:

"... A television broadcasting undertaking may well sell no sponsored air time and produce no programs, yet remain a television broadcasting undertaking. Conversely, an undertaking may sell sponsored air time for another or produce programs which it sells to another undertaking without thereby becoming a television broadcasting undertaking."

(pages 169; 218; and 12,152; emphasis added)

We note that J.P.L. Productions in Paul L'Anglais Inc. et al, supra, was a subsidiary of the core federal undertaking, Télé-métropole, yet was neither a broadcasting undertaking in its own right nor was it vital or integral to its parent company. While an important point to keep in mind, the fact that VTR is an independent entity does not mean that it can never be within this Board's jurisdiction. However, the facts would have to demonstrate clearly that VTR was vital or essential to the CBC in a way that J.P.L. Productions was not for its parent company Télé-métropole.

A subsidiary of a broadcasting operation or even an independent entity may be so vital or essential vis-à-vis the core federal undertaking that the Northern Telecom Limited test becomes applicable. This Board has considered such an argument in two relatively recent cases. In this regard, please see Canadian Broadcasting Corporation (1987), 71 di 12 (CLRB no. 646) and Shamrock Television System Inc., CKOS-TV and CICC-TV (1987), 70 di 168; and 17 CLRBR (NS) 205 (CLRB no. 639).

In Shamrock, supra, an employer sought to divide his business in two by separating the actual broadcasting

employees from those working in the sales department, office administration and a department that specialized in producing commercials. In his view, the latter were under provincial jurisdiction. The employer argued that these exclusions were consistent with Paul L'Anglais Inc. et al., supra. The Board disagreed, however. The three departments were non-severable parts of a single television broadcasting undertaking. Accordingly, the Board did not hesitate to find that the indivisible undertaking came within federal jurisdiction.

In Canadian Broadcasting Corporation, supra, the question for the Board was whether a separate corporate entity, Ciné Le Matou, which co-produced a film to be aired on the CBC, was so vital or essential to the CBC that it came within this Board's jurisdiction. The Board found that it did not:

"With respect to the test advocated in Northern Telecom Limited, supra, we have already noted that in our eyes the decision of the Supreme Court in Paul L'Anglais Inc., supra, did nothing more, in a word, than establish the principle of provincial constitutional jurisdiction over the production of audio-visual material. However, depending on the case, Shamrock Television System Inc., supra, being one, the finding may differ from that made by the Supreme Court. Had Ciné Le Matou Inc. been in a position of true working integration into the operations of the CBC, the result might have been different.

In the instant case, the evidence offered no fact that could be used to escape the conclusion set out in Paul L'Anglais Inc., supra, or the approach taken in Empress Hotel, supra. Ciné Le Matou Inc. was only fleetingly associated with the CBC, in circumstances that demonstrated no 'integral', 'essential' or 'vital' relationship between the two enterprises."

(pages 50-51)

What of the instant case? The Board finds that VTR also fits within the principles flowing from the Supreme Court's decision in Paul L'Anglais Inc. et al., supra. VTR itself is not a broadcaster. It has no broadcasting license from the CRTC. Furthermore, its business is simply not concerned with the transmission, emission or reception of signs, signals, writing, images, sounds or intelligence. It transmits nothing via the air waves.

There is also nothing vital, essential or integral about the relationship between the CBC and VTR. The two entities are entirely separate companies. While this fact is certainly not conclusive, the evidence also shows that nothing in VTR's activities would lead us to find that VTR fulfills the third part of the test set out in Northern Telecom Limited, supra.

The above facts, and particularly the non-broadcasting activities of VTR, have lead the Board to conclude that it no longer has constitutional jurisdiction over VTR's activities. For this reason, we will not be dealing with the merits of Mr. Evans' application nor with the argument that Mr. Evans may not have been an employee and thus was ineligible to file this revocation application.

Given its lack of constitutional jurisdiction over VTR, the Board hereby dismisses the application for revocation. However, for the same reason, the Board rescinds the certification order issued to NABET in 1963, pursuant to section 18 of the Code:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

Serge Brault

Serge Brault
Vice-Chairman

Calvin B. Davis

Calvin B. Davis
Member of the Board

Robert Cadieux

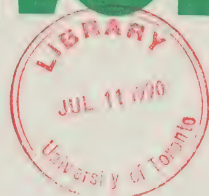
Robert Cadieux
Member of the Board

Dated at Ottawa, this 31st day of May 1990.

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Summary

CANADIAN UNION OF POSTAL WORKERS,
COMPLAINANT, AND CANADA POST
CORPORATION, EMPLOYER.

Board File: 745-3472

Decision No.: 800

Résumé de décision

LE SYNDICAT DES POSTIERS DU CANADA,
PLAIGNANT, ET LA SOCIÉTÉ CANADIENNE
DES POSTES, EMPLOYEUR.

Dossier du Conseil: 745-3472

No de Décision: 800

Unfair labour practice complaint
filed pursuant to section 94(1)(a)
of the Canada Labour Code (Part I -
Industrial Relations). Motion by
the employer to defer matter to
arbitration pursuant to section
98(3).

Following what it characterized as
serious disruptions in the work
place caused by full-time union
officials, Canada Post issued a ban
denying them access to any of their
facilities in Metro Toronto. The
employer added that it would no
longer meet with the union in any
Canada Post premises but would
agree to do so outside, if the
union agreed to pay 50% of the
costs. At the time, the union was
holding elections. One of the two
officials denied access to company
premises was defeated. The ban
had been lifted two months prior
to the hearing.

After having heard the evidence,
the Board found that regardless of
the apparent seriousness of the
allegations, no genuine statutory
right was in fact at issue. The
Board consequently deferred the
matter to arbitration pursuant to
section 98(3).

Plainte de pratique déloyale en
vertu de l'alinéa 94(1)a) du Code
canadien du travail (Partie I -
Relations du travail). Requête de
l'employeur que la question soit
renvoyée à l'arbitrage en vertu du
paragraphe 98(3).

A la suite de ce qu'il a considéré
comme des perturbations importantes
de ses activités causées par deux
dirigeants syndicaux permanents,
la Société canadienne des postes
leur a interdit l'accès à tous ses
établissements de la région de
Toronto. La Société a de plus
refusé de participer à des
rencontres avec le syndicat à
l'extérieur sauf si le syndicat
acceptait d'en assumer la moitié
des coûts. Ces incidents se sont
produits en même temps que les
élections syndicales. L'un des
deux dirigeants privés d'accès aux
locaux de l'employeur a été défait
aux élections. L'interdiction
d'accès avait été levée deux mois
avant les audiences.

Après avoir entendu la preuve, le
Conseil a jugé que, sans égard au
sérieux des allégations, dans les
faits, aucun droit fondamental
n'était en jeu. Le Conseil a donc
renvoyé l'affaire à l'arbitrage en
vertu du paragraphe 98(3).

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Reasons for decision

Canadian Union of Postal Workers,
complainant,
and

Canada Post Corporation,
employer.

Board File: 745-3472

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. Robert Cadieux and Michael Eayrs, Members.

Appearances:

Mr. Paul Cavalluzzo, for the Canadian Union of Postal
Workers; and

Mr. Peter J. Thorup, for Canada Post Corporation.

These reasons for decision were written by Mr. Serge
Brault, Vice-Chairman.

I

THE PROCEDURE

This is a complaint pursuant to section 97(1) of the Canada
Labour Code (Part I - Industrial Relations) filed by the
Canadian Union of Postal Workers (CUPW) and two of its
officials, Messrs. André Kolompar and Ron Pollard,
respectively President and fourth Vice-President of CUPW
(Toronto Local) (hereinafter the complainant). It alleges
that Canada Post Corporation (CPC or the employer) violated
section 94(1)(a) of the Code by issuing a directive denying
these two union officials access to all postal facilities
located in the Toronto region (York Division). It also

alleges that a refusal by CPC to hold meetings with the union on company premises also violated the Code.

Section 94(1)(a) reads as follows:

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;..."

In its reply to the complaint, the employer denied any violation of section 94(1)(a) and further submitted that pursuant to section 98(3) of the Code, CPC and CUPW could deal with the matter giving rise to the complaint through the grievance arbitration provisions of the existing collective agreement.

Section 98(3) reads as follows:

"98. (3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

A hearing into this complaint was held in Toronto on May 2, 3, 4, 8 and 9, 1990.

II

THE FACTS

Before we address the preliminary issue raised by CPC as to whether the Board should defer this matter to arbitration, we found it appropriate, given the seriousness

of this issue, to hear the evidence the parties had to offer. There is no doubt that as a matter of principle denying access to employer premises for any purposes to union officials or the refusal to meet with union officials obviously raise questions that at first glance impact on fundamental rights recognized under the Code.

CPC's York Division, the largest regional operation in the Canadian postal system, services the Toronto region and employs over 8000 persons represented by CUPW. It consists of some 70 postal facilities, including vast letter processing plants, spread out in the greater Toronto region.

For its part, the Toronto Local of CUPW is under the responsibility of seven full-time elected officers, two of which are involved here, plus a hired staff of three secretaries.

On November 8, 1989, Mr. Kolompar and Mr. Pollard were each sent a letter by CPC which it is appropriate to reproduce at length:

*"Mr. André Kolompar
President - Toronto Local
Canadian Union of Postal Workers
861 Broadview Avenue
Toronto, Ontario
M4K 2P9*

Dear Mr. Kolompar:

Your conduct on Canada Post premises continues to be entirely unacceptable. In particular, on the evening of November 6, 1989 you were actively involved and in the forefront of a very disruptive incident that occurred at the South Central L.P.P. on Eastern Avenue. Additionally, on the following evening November 7, 1989 you were again involved in similar disruptive activities at the South Central L.P.P.

Such unacceptable behavior from you is persistent and continues despite previous

warnings to you. In the past, on January 13, 1987 you engaged in similar disruptive behavior at three York Division facilities, namely the W.L.P.P., the S.C.L.P.P. and 20 Bay Street, Toronto. Additionally, on January 15, 1988 you formally acknowledged that you had violated a Court Order dated October 9, 1987 which had restricted your activities pertaining to any property or installations of Canada Post Corporation. Again on January 14, 1989 you were active and in the forefront of a disruptive demonstration at the Gateway Postal Facility. And a similar incident occurred a few days later on January 20, 1989 at the same facility.

You have continually disregarded the restrictions placed on you as a result of your past behaviour and it is evident that you are not prepared to conduct yourself in a proper manner while on Corporate premises.

This letter, therefore, is to advise you that from the date hereto, you are restricted under all circumstances, from all postal premises in York Division because of your ongoing disruptive and unacceptable behaviour.

Please note, however, that in recognition of the position that you occupy with the Toronto Local of the CUPW, York Division Management is still prepared to meet with you to discuss matters of mutual concerns, but only on the understanding that such meetings will be off site from any Canada Post Corporation premises, and also on the understanding that the Union will absorb half of the costs related to such meetings. A formal response from you is necessary with regard to sharing such costs.

Take notice that if you present yourself at any postal facility within York Division from November 8, 1989 onward, you will be charged with trespassing in respect of such premises.

Yours truly,

R.C. Johnson
Divisional General Manager
Yors Division

cc: All Directors of Operations
Director of Security & Investigations
Manager of Labour Relations

Ron Pollard
CUPW Toronto Local
861 Broadview Avenue
Toronto, Ontario
M4K 2P9

Dear Mr. Pollard:

Your record when you were an employee with Canada Post revealed the following:

- June 29, 1988 - 1 day suspension for abusive language to a Supervisor and insubordinate actions regarding leave for Union business requests.
- July 6, 1988 - 3 day suspension for falsifying time cards and refusing a direct order from a Manager.
- July 11, 1988 - 10 day suspension for refusing to report for duty, refusing a direct order and defiance of Management authority, and past record.
- Aug. 27, 1988 - without authorization, removed the keys from a Corporate vehicle at the A.M.F.
- Aug. 29, 1988 - entered a Security office without authorization and destroyed a telephone.
- Aug. 31, 1988 - discharged from employment for major misconduct of August 29 and 31, 1988.

In June 1989 you were formally advised that, because of your disruptive activities on May 31, 1989 which resulted in police being called to remove you from the premises at the WLPP facility, your access to postal premises in York Division were restricted. You were advised of the procedures that you had to follow with regard to those restrictions.

On the evening of November 6, 1989 you were involved, as a Union Representative, in a very disruptive incident at the South Central facility. This visit was not authorized nor approved by Management which was in violation of the instructions previously given to you.

On November 8, 1989 at approximately 2:45 a.m. at the South Central facility you met with the Manager of the #1 Shift in your role as a Union Representative assisting two employees who were being interviewed by Management. Both interviews had to be discontinued because of your interference in not letting the employees speak for themselves. At the conclusion of the interviews you made the following remarks to the Shift Manager.

- You called him a '... asshole' twice.
- You asked him 'do you feel good being a ... asshole'?

- When asked to be civil, you stated 'I will be civil out of here or on the floor, but not with you ... guys'. You also stated that you 'would conduct myself the way I feel behind closed doors'.
- 'You are a complete ... asshole'.
- In front of one of the employees being interviewed who had voiced her discontent on working for Canada Post Corporation you stated 'I don't blame you, working for those ... assholes'.

It is quite obvious that you are not prepared to conduct yourself in a civil and acceptable manner when visiting postal facilities, or dealing with Management representatives of the Corporation, as evidenced by your past and current disruptive activities. For those reasons, you are hereby advised that you are restricted from any postal premises within Canada Post under any circumstances from the date of this letter onwards.

If you attempt to disregard these restrictions, you will be charged with trespassing.

Yours truly,

R.C. Johnson
Divisional General Manager
York Division

cc: All Directors
Manager, Security & Investigations
Manager, Labour Relations

[sic]"

(expletives omitted)

As it turned out, shortly following the imposition of this ban, the union held its statutory local election. At the end of February 1990 Mr. Pollard was defeated as union official. For his part, Mr. Kolompar was acclaimed president and is still in office. Since Mr. Pollard had previously been dismissed as a CPC employee in the summer of 1988, he no longer has any official ties to the Corporation; his dismissal as well as other disciplinary

actions taken against him are currently pending arbitration.

When they received the letter from management denying them access, the two union officials sent to CPC a long reply under Mr. Kolompar's signature on November 20, 1989:

"November 20, 1989

*Mr. R.C. Johnson
Divisional General Manager
York Division
Canada Post Corporation
20 Bay Street
Toronto, Ontario*

*Re: Denial of Access to CPC Premises for the
Toronto Local's President & 4th Vice-
President*

Sir:

I am in receipt of your letter dated November 8, 1989 regarding the above subject matter addressed to myself and Brother Ron Pollard.

Please be advised that the Union views your actions in denying access to Brother Pollard and myself onto CPC premises, as being:

- 1) In violation of Article 3 of the collective agreement*
- 2) In violation of the Canada Labour Code, in that you are interfering within the administration of the Union*
- 3) In violation of the Canada Labour Code, in that you are engaging in an unfair labour practice*
- 4) In violation of Article 8.02 of the collective agreement, in that you are proposing that the Union share the cost of all off-site meeting rooms, despite the very clear requirement of the collective agreement that all consultations be held on the employers premises.*

I also find it quite interesting that you have chosen to sever all possibility of consultation with the Union, in accordance with all of the provisions of the collective agreement, despite the undisputed fact that of ALL of the incidents which you rely upon as justification for imposing the denial of access, NONE occurred in conjunction with a Consultation Meeting.

It should also be noted that neither within the letter addressed to me or the one addressed to Brother Pollard, do you claim that Brother Pollard or I pose a security risk to the Corporation. Nor do any of the incidents, to which you refer, involve any violent behaviour or threat of violence from either Brother Pollard or myself. In fact, it is quite clear that you do not allege any behaviour on our part which contains violence or threat of violence.

I also wish to have it noted that in imposing this denial of access, you are also interfering with the Toronto Local's process of electing its Executive Officers, more specifically, you are wilfully interfering with and impeding Brother Pollard's and my ability to campaign for election in the Executive Committee Elections process which commences in January/1990. I also know that you and your representatives are fully aware of the upcoming election process and were aware of the timing of this process at the time when you made the decision to deny access. It cannot be disputed that both Brother Pollard's and my ability to campaign in this election process is severely prejudiced by your illegal action in denying us access to CPC premises.

In addition, I wish to deal with the most recent incident to which you refer within your letters of November 8, 1989, specifically the incidents at the South Central L.P.P. on November 6, 1989 and November 7, 1989. On November 5, 1989, Mr. Tip Wong (Manager #3 shift - S.C.L.P.P.) advised over 100 of my members, within the S.C.L.P.P. - A.B.C. Section on the #3 Shift, that I, as their President, would be allowed into the cafeteria to meet with them, as long as it was on non-company time. This commitment arose during the questioning of Mr. Wong, by these members, about the fact that their schedules for the weeks of November 5 through to November 18, 1989 were changing without any REAL opportunity for the Union to consult as per Article 14 of the collective agreement. Many of the members who heard Mr. Wong give the commitment that I would be allowed into the cafeteria to meet with them, called me on November 6, 1989 (in the morning), advised me of Mr. Wong's commitment and requested that I meet with them in the South Central cafeteria at 6:30 p.m. (half hour prior to their starting time).

At 6:30 p.m. on November 6, 1989, Brother Pollard and I arrived at the security kiosk at South Central. We identified ourselves to the security officer on duty and requested that he page Mr. Wong to call the PAX phone in the kiosk. Mr. Wong called and I advised him that I was there based upon his commitment to over 100 of my members and that

I was proceeding into the cafeteria only. Mr. Wong stated that he would check on it and I told him that he could get back to me in the cafeteria. I then proceeded, unquestioned by anyone, into the cafeteria and proceeded to meet with the members who had gathered in the cafeteria for this purpose. Within a few minutes Mr. Wong arrived and insisted that Brother Pollard and I leave the premises. I asked Mr. Wong why he authorized our entry through the commitment he made to over 100 of my members. To this, Mr. Wong replied 'I never gave such a commitment'. At this point, a large number of members told Mr. Wong 'you did say he could come in, I heard you, why are you now lying?' Mr. Wong left at this point.

After our meeting in the cafeteria was concluded, Brother Pollard and I left the cafeteria and proceeded to the public lobby area where we encountered Mr. Douglas Meacham, who was being questioned by many of the members. I asked Mr. Meacham why he waited until the very last minute to notify the Union of the aforementioned schedule changes, thereby, totally negating the possibility of consultation reasonably in advance of the actual changes. Mr. Meacham's response was 'Andre, you know I can't tell you that.'

Mr. Meacham also refused to tell the numerous members, who asked the same question, why he waited until the very last minute to notify the Union. The only response that Mr. Meacham had was to call the police in order to remove myself and Brother Pollard from the non-working premises of the South Central plant.

In view of all the foregoing facts, the Union is advising you of the following:

- 1) All Consultation Meetings to which you deny access to a representative of the Toronto Local shall be deemed to constitute a refusal, on the Corporation's part, to hold meaningful Consultation with the Union.
- 2) The Corporation shall be held liable to compensate all CUPW members who are prejudiced in any way as a result of changes which are implemented, despite the failure of the Corporation to consult with the Union.
- 3) The Corporation shall be held liable to compensate the Officers who are prejudiced, within the Union's election process, as a result of the herein mentioned illegal denial of access.

In addition, I strongly urge you to reflect upon the recent CLRB decision on the Van Dock and Metcalfe vs. Canada Post Corporation case, as well as jurisprudence from the CLRB and arbitrators on matters of similar or identical nature.

Finally, I wish to emphasize that both Brother Pollard and myself have conducted ourselves in accordance with all of the requirements of the collective agreement whenever we attended any scheduled meetings or hearings with your representative and we certainly intend to continue to comply with all of the provisions of the collective agreement. However, when your representatives commit wilful violations of our members' rights, you should not be at all surprised that the membership and their leadership DEMONSTRATE our anger and frustration against your representatives wilful and blatant violations of our collective agreement. It is also not acceptable for you to suggest that there are 'avenues' which the Union can pursue in order to get redress for the wilful violations by your representatives. It is your same representatives that daily advise our member 'Go ahead grieve it, we won't have to deal with it for four or five years'. The grievance procedure is based upon the pretense that BOTH parties will operate in good faith, but when one party to the collective agreement ignores most of the provisions of said agreement, then the entire process falls apart, thereby, causing the membership of the Union to take alternate steps in order to resolve issues of immediate concern or, at the very least, vent some of the pent-up frustration and discontent.

Mr. Johnson, this situation will not improve itself without some good-faith being shown between the parties. If this situation is allowed to continue to boil and fester, then eventually it will, most definitely, result in wildcats, work stoppages, etc.

Your attitude towards this possibility may be rather unconcerned, however, even though you may be able to impose severe discipline in the short term, your operation will still suffer from such actions (wildcats, stoppages, etc.) and a longer term the situation can only get worse. Therefore, I suggest that you and your representatives lift the denial of access which you have imposed against Brother Pollard and myself, and that a serious meeting be scheduled between you and I, with representatives from my Executive and representatives from York Division CPC. I suggest that you have nothing to lose by lifting the denial access in order to enable such a meeting to occur and I will further assure you that the Union Representatives shall not organize any action to coincide with our meeting.

I sincerely hope that you will recognize the necessity of having such a meeting and I hope to hear from you in the immediate future.

Yours truly,

*Andre Kolompar,
President,
CUPW Toronto Local.*

*c.c. Toronto Local Executive Committee,
B. Borch, J.C. Parrot, D. Tingley,
G. Courville, W. Legge, G.
Alexopolous, D. Meacham, M. Wilde,
T. O'Connell, G. Fehrera, D.
Kraichie.*

[sic]"

As is evidenced by these documents, the final incidents that triggered the employer's decisions happened around November 6, 7 and 8, 1989.

Those incidents revolve around the union's reaction to a decision taken by CPC around October 26, 1989. On that date, the employer informed the union it intended to change the work schedules of employees working in the South Central letter processing plant. Without going into details, suffice it to say that in the latter days of October, CPC realized that for operational purposes it needed to change those schedules in view of the November 11th (Remembrance Day) holiday. CPC feared sufficient staff would not be on hand to process the mail on November 13 and 14 if the number of employees scheduled to be away on holiday was not changed. In order to correct that, it was needed to modify the schedules and, by the same token, change the days off of hundreds of employees. Under the collective agreement, such changes can only be made following consultation with the union. Without the changes, CPC would have had to call employees in overtime

and pay them accordingly in order to keep operating normally.

CPC did offer to consult with the union. The fact of the matter is that the intended format and the content of the discussions, were either late in being conveyed to the union or worded in such a way that the union felt it could not accept them.

In reaction to the last-minute consultation proposed by CPC, the union declined to participate in any meeting. This consultation was seen as useless and only designed to whitewash management's poor planning. In reaction, CPC acted unilaterally. The union challenged the move and notified the employees that the proposed changes were "illegal". For obvious reasons, tension ran high on all sides and lead to a formal confrontation on the worksite on November 6. On that day, Mr. Kolompar lead a group of unsatisfied employees who were actually reporting to work under their old schedule even though they no longer had to report to work.

As is evidenced by the letters reproduced earlier other incidents are alleged on both sides, but we need not recount at length the evidence heard.

For instance, much time was afforded to hearing evidence on what took place between Mr. Pollard and a shift manager on November 8, 1989 when Mr. Pollard was acting as union representative during disciplinary interviews. Mr. Pollard apparently started swearing and using foul language. During his evidence, Mr. Pollard did not really challenge CPC's assertions; he insisted that such language was normal between equals and that when he was acting in his capacity

as union officer, and therefore as equal, he was not accountable for his language and could not be disciplined for having used foul language.

III

DEFERRAL TO ARBITRATION

As mentioned earlier, CPC suggested that this matter be deferred to arbitration pursuant to section 98(3) of the Code. As indicated in Mr. Kolompar's letter of November 8, 1989 (page 3), the union alleges that the imposition of a ban on access to company premises violates the Code as well as the parties' collective agreement. Given the seriousness of the allegations, the Board informed the parties at the outset that it would not make a determination on section 98(3) before having heard the evidence.

a) Parties' submissions with respect to section 98(3)

Counsel for the employer argued that the ban imposed in the instant case as well as its refusal to meet with union officials on its premises were lifted more than two months before the hearing took place. He added that things have since been going well and that a determination by the Board on these matters would only be academic. Counsel further argued that the incidents leading to this complaint are the most recent episode in the deteriorated labour relations existing between the parties. Counsel relied on the following decision to conclude that the Board should defer this matter to arbitration: (Victoria Soya Mills, [1989] OLRB Rep. June 653).

Counsel for CUPW argued that this case was a first in Canadian labour law and that it raises serious statutory issues in the sense that CPC's ban directly affected the conduct of union elections. Counsel insisted that if the Board did not decide this matter, it would be tantamount to condoning the ban imposed by management.

Pretty much like counsel for CPC, counsel for the union relied on case law establishing the principle that where statutory rights may be in jeopardy, labour boards will usually refrain from deferring to arbitration matters such as this one. (See Canada Post Corporation (1989), as yet unreported CLRB decision no. 729; Canada Post Corporation (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426); Valdi Inc. (Trading as Valdi Discount Foods), [1980] OLRB Rep. August 1255; and [1980] 3 Can LRBR 299; Ford Glass Limited, [1986] OLRB Rep. May 624; McDonnell Douglas Canada Limited, no. 1041-87-U, October 20, 1987 (OLRB); MacDonnell Douglas Canada Limited, [1988] OLRB Rep. May 498; Canada Post Corporation (1988), as yet unreported CLRB decision no. 693; Maritime Employers' Association (1985), 63 di 69; and 12 CLRBR (NS) 18 (CLRB no. 540); Canada Post Corporation (1980), as yet unreported CLRB decision no. 772).

b) Decision on the deferral to arbitration

At first blush, this complaint indeed appears to raise issues that could entice the Board to reassert the right of union officials to conduct union business without undue interference. On the other hand, the existing collective agreement contains numerous provisions guaranteeing union rights and allowing for their application.

First, there is the allegation that CPC's decision to deny Messrs. Pollard and Kolompar access to its premises prevented them from campaigning efficiently for election. There is another allegation that CPC while aware of that campaign still maintained its ban, thereby interfering knowingly in union elections. In fact, Mr. Pollard was defeated by less than 20 ballots in a vote where well over a 1000 employees exercised their right to vote. The complainant suggested that the ban imposed on Mr. Pollard might have affected the result of the election. Conversely, the union did not cancel or postpone its elections when it saw that CPC had imposed a ban that might adversely affect the ability of some of its members to run an efficient election campaign. The Board asked if the union had taken any internal decision with respect to Mr. Pollard's defeat. The answer is no. As a specific remedy for this alleged violation of the Code by CPC, the complainant is seeking a monetary award in favour of Mr. Pollard.

Is there in this case a genuine statutory right that the Board must define or reassert? After having reviewed the evidence and the parties' submissions and on the basis of the evidence, we find that there is none.

The evidence heard throughout the five days often revolved around the notion of frustration or the expression of frustration. This evidence illustrated how the parties perceive they should handle labour relations. To a very large extent, the problem, on both sides, is one of attitude and has nothing to do with fundamental rights.

Obviously in the last days of October 1989, the employer, as its own counsel pointed out, gave evidence of very poor

planning. It also displayed little consideration for labour relations when it parachuted a last-minute change to work schedules into one of its main processing facilities . It is not for us to decide whether in so doing CPC violated the collective agreement. Without these last-minute changes, CPC would have had to pay overtime to ensure the proper processing of mail. Presumably, some managers might have found themselves in trouble since a statutory holiday is everything but unforeseeable. They pressed the panic button.

How did the union leadership react to such poor planning and short-sightedness? Basically, it followed suit and did the same. It saw a good opportunity to catch management red-handed. It pressed its own panic button and fanned the flames. It managed to miss completely what could have been a good opportunity to sit with CPC and maybe even negotiate a solution which would satisfy the membership, help management out of a tough situation or convince them to stick with the old schedules.

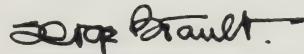
The Code exists to provide the parties with a framework that is conducive to sound and meaningful labour relations. The Board exists to ensure that no one tampers with that framework. Our role is not to overview or secondguess how both sides run their affairs. Yet, while it is not for us to judge either side's ultimate motivations, such a factor is relevant when deciding whether adjudicating this matter on its merits would serve any sound labour relations purpose. Without deciding the issue on its merits, we find that the events leading to this complaint have more to do with personalities than fundamental rights.

As our Ontario counterparts concluded in Victoria Soya Mills, supra:

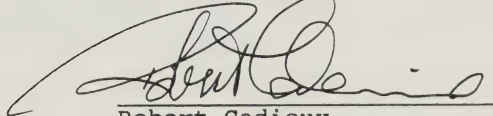
"What we have before us is a simple conflict of personalities and a contest over which party will ultimately turn out to be more stubborn and short-sighted. That is not the kind of situation in which the Board, in its discretion, should be involved."

(page 658)

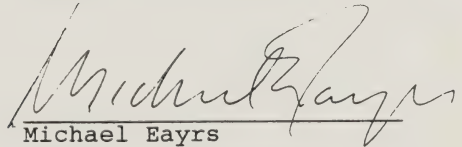
For all these reasons, the Board finds that making a determination on the merits of this complaint would serve no sound labour relations purpose. This complaint would be better dealt with via the arbitration provisions applicable to the parties pursuant to section 98(3) of the Code. This complaint is accordingly dismissed.



Serge Brault
Vice-Chairman



Robert Cadieux
Member of the Board



Michael Eayrs
Member of the Board

DATED at Ottawa, this 5th day of June 1990.

CLRB/CCRT - 800

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Publications

ERRATA

July 6, 1990

le 6 juillet 1990

Notice to subscribers

Avis aux abonnés

Please note that in the process of correcting page 13 of the Board's Reasons for decision no. 800, the first line was deleted by mistake. An amended page 13 is therefore enclosed, reflecting the correction.

Veuillez noter qu'en effectuant une correction à la page 13 des Motifs de décision n° 800, la première ligne a été supprimée par mégarde. Ci-joint vous trouverez donc une copie corrigée de la page 13.

We are sorry for the inconvenience this may have caused.

Nous nous excusons pour tout ennui que cela a pu vous causer et nous vous prions d'agréer, Monsieur/Madame, l'expression de nos sentiments les meilleurs.

Sincerely,

J. Paulin

for J. Paulin
par Publications Officer/
Agente des publications

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Counsel for CUPW argued that this case was a first in Canadian labour law and that it raises serious statutory issues in the sense that CPC's ban directly affected the conduct of union elections. Counsel insisted that if the Board did not decide this matter, it would be tantamount to condoning the ban imposed by management.

Pretty much like counsel for CPC, counsel for the union relied on case law establishing the principle that where statutory rights may be in jeopardy, labour boards will usually refrain from deferring to arbitration matters such as this one. (See Canada Post Corporation (1989), as yet unreported CLRB decision no. 729; Canada Post Corporation (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426); Valdi Inc. (Trading as Valdi Discount Foods), [1980] OLRB Rep. August 1255; and [1980] 3 Can LRBR 299; Ford Glass Limited, [1986] OLRB Rep. May 624; McDonnell Douglas Canada Limited, no. 1041-87-U, October 20, 1987 (OLRB); MacDonnell Douglas Canada Limited, [1988] OLRB Rep. May 498; Canada Post Corporation (1988), as yet unreported CLRB decision no. 693; Maritime Employers' Association (1985), 63 di 69; and 12 CLRB (NS) 18 (CLRB no. 540); Canada Post Corporation (1980), as yet unreported CLRB decision no. 772).

b) Decision on the deferral to arbitration

At first blush, this complaint indeed appears to raise issues that could entice the Board to reassert the right of union officials to conduct union business without undue interference. On the other hand, the existing collective agreement contains numerous provisions guaranteeing union rights and allowing for their application.

as union officer, and therefore as equal, he was not accountable for his language and could not be disciplined for having used foul language.

III

DEFERRAL TO ARBITRATION

As mentioned earlier, CPC suggested that this matter be deferred to arbitration pursuant to section 98(3) of the Code. As indicated in Mr. Kolompar's letter of November 20, 1989 (page 7), the union alleges that the imposition of a ban on access to company premises violates the Code as well as the parties' collective agreement. Given the seriousness of the allegations, the Board informed the parties at the outset that it would not make a determination on section 98(3) before having heard the evidence.

a) Parties' submissions with respect to section 98(3)

Counsel for the employer argued that the ban imposed in the instant case as well as its refusal to meet with union officials on its premises were lifted more than two months before the hearing took place. He added that things have since been going well and that a determination by the Board on these matters would only be academic. Counsel further argued that the incidents leading to this complaint are the most recent episode in the deteriorated labour relations existing between the parties. Counsel relied on the following decision to conclude that the Board should defer this matter to arbitration: (Victoria Soya Mills, [1989] OLRB Rep. June 653).

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This is not an official document.
Only the reasons for Decision can
be used for legal purposes.

Summary

CANADIAN AIR LINE PILOTS
ASSOCIATION (CALPA), APPLICANT, AIR
ALLIANCE AS WELL AS AIR ONTARIO
INC., AIR ONTARIO LIMITED, AND
AUSTIN AIRWAYS LIMITED,
RESPONDENTS, AIR CANADA, MIS-EN-
CAUSE, AND JEAN-PIERRE BOLDUC ET
AL., INTERVENORS.

Board File: 530-1577
560-184

Decision no.: 801

Application pursuant to sections
35 and 18 of the Canada Labour Code
(Part I - Industrial Relations).
The union asked that Air Ontario
and Air Alliance be declared single
employer. The application was
dismissed.

CALPA is certified for all Air
Ontario pilots. Air Alliance
pilots are not unionized. Air
Canada owns 75% of Air Ontario and
Air Alliance, which was created by
Air Canada.

Air Ontario and Air Alliance are
both partners of Air Canada. CALPA
had decided not to seek any remedy
against Air Canada following
internal union decisions. The
union submitted that the Board
could still, on its own motion, add
Air Canada to a section 35
declaration. The Board found,
following discussion, that the
circumstances of this case did not
warrant that it act on its own
motion.

On the basis of the evidence, the
Board found the application
founded and dismissed it.

Ce document n'est pas officiel.
Seuls les motifs de décision
peuvent être utilisés à des fins
juridiques.

Résumé de décision

L'ASSOCIATION CANADIENNE DES
PILOTES DE LIGNES AÉRIENNES
(CALPA), REQUÉRANTE, ET AIR
ALLIANCE, AINSI QUE AIR ONTARIO
INC., AIR ONTARIO LIMITÉE, AUSTIN
AIRWAYS LIMITED, INTIMÉES, AIR
CANADA, MISE EN CAUSE, ET JEAN-
PIERRE BOLDUC ET AUTRES,
INTERVENANTS.

Dossiers du Conseil: 530-1577
560-184

N° de Décision: 801

Requête en vertu des articles 35
et 18 du Code canadien du travail
(Partie I - Relations du travail).
Le syndicat demandait qu'Air
Ontario et Air Alliance soient
déclarées employeur unique. La
requête est rejetée.

CALPA est accrédité pour
représenter tous les pilotes d'Air
Ontario. Il n'y a pas de syndicat
chez Air Alliance. Les deux
sociétés sont la propriété d'Air
Canada à 75 %. Air Alliance a été
créée par Air Canada.

Air Ontario et Air Alliance sont
deux partenaires d'Air Canada. Le
syndicat a décidé de ne pas viser
Air Canada dans ses conclusions en
raison de décisions de ses
instances syndicales. Le syndicat
a plaidé que le Conseil pourrait,
de sa propre initiative, ajouter
Air Canada à une déclaration
d'employeur unique en vertu de
l'article 35 du Code. Commentaires
du Conseil sur les raisons pouvant
justifier qu'il agisse de sa propre
initiative. Le Conseil a jugé
qu'en l'espèce c'était au syndicat
de prendre pareille décision.

Vu la preuve, le Conseil a jugé que
la requête était mal fondée.
Requête rejetée.

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| Relations du |
| Travail |

Reasons for decision

Canadian Air Line Pilots' Association (CALPA),

applicant,

and

Air Alliance,

and

Air Ontario Inc., Air Ontario Limited and Austin Airways Limited,

co-respondents,

and

Air Canada,

mis-en-cause

and

Jean-Pierre Bolduc et al.,

intervenors.

Board Files: 530-1577
560-184

The Board was composed of Mr. Serge Brault, Vice-Chairman and Ms. Linda Parsons and Mr. Victor Gannon, Members.

Appearances:

Mr. John Keenan and Ms. Lila Stermer, for the Canadian Air Line Pilots' Association (CALPA);

Mr. William G. Phelps, Q.C., assisted by Mr. Peter Hill, for Air Ontario Inc.;

Mr. Michel Towner, assisted by Mr. Gilles Filiatreault, for Air Alliance;

Ms. Margaret Allen and Mr. Victor Marchand, for Air Canada; and

Mr. John O'Connor, assisted by Mr. Louis Parent, for the intervenors.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

THE PROCEEDINGS

In this application, the Canadian Air Line Pilots' Association (CALPA or the applicant) is asking the Board, pursuant to section 35 of the Canada Labour Code (Part I - Industrial Relations), to declare that Air Ontario Inc., Air Ontario Ltd. and Austin Airways (hereinafter called Air Ontario) and Air Alliance constitute a single federal work, undertaking or business and a single employer within the meaning of the Code. Initially, the applicant was also asking the Board, pursuant to sections 44 and 45 of the Code, to declare that a sale of business had taken place between these two businesses. That application was withdrawn in the course of the hearing. Finally, the union, relying on section 18 of the Code, is asking that its certification in respect of Air Ontario be extended to include Air Alliance.

The applicant union is certified in respect of Air Ontario and is a party to a collective agreement covering all Air Ontario pilots. However, the pilots of Air Alliance, a new business, are not unionized. They are intervening in these proceedings to oppose the application. Air Canada, the mis-en-cause, in practice participated in these proceedings merely as an observer since no findings were sought against it.

The hearing in this case concluded on February 22, 1989.

II

THE FACTS

Air Ontario and Air Alliance are regional carriers associated with Air Canada which, as we noted, is not affected by these proceedings.

The Board has had the opportunity to describe in great detail the development of air transport in Canada, and in particular the development of Air Canada and its affiliated carriers following what is commonly called deregulation (Air Canada (1989), 90 CLLC 16,008 (CLRB no. 771)). Essentially, the regional air carriers reorganized into two groups, each under the umbrella of one of two major national carriers, Canadian International (CAIL) and Air Canada. Deregulation forced these two carriers to acquire regional bases in order to extend their network and ensure their viability. As soon as the government stopped assigning routes to certain carriers on an exclusive, or at the very least protected basis, there followed a series of realignments that even today do not appear to be completed.

In the instant case, the applicant argues essentially that Air Canada created Air Alliance out of nothing to serve what approximates the Quebec regional market. Roughly defined, Air Ontario, for its part, is the Air Canada affiliate that serves Ontario.

Shortly before Air Alliance was created in March 1988, Air Canada had acquired 75% ownership in Air Ontario.

The remainder of its share capital is held by the De Luce family, which previously held the majority of Air Ontario's assets.

Air Ontario is the largest regional carrier within the Air Canada family. It employs nearly 200 pilots and has a fleet of 51 aircraft, including numerous Dash-8s. In 1988, when the great upheaval in regional air transportation in Canada occurred, Quebec was basically served by two regional carriers, Nordair and, on a larger scale, Québecair. These two carriers have since disappeared, having basically been incorporated into the CAIL family, Air Canada's main rival. According to the evidence, Air Canada, in an attempt to counter CAIL's penetration of the Quebec market and ensure its own entry, commissioned a small group headed by André F. Lizotte, formerly with Nordair, and assisted by Gilles Filiatreault, who himself was with Québecair until it disappeared, to find the best possible way of acquiring a regional carrier in Quebec.

At the outset, Air Canada had its eye on Québecair, but as events turned out, Québecair decided to join the CAIL family. Cornered, Air Canada then authorized Mr. Filiatreault to create a regional carrier out of nothing to serve Quebec. It was decided that the ideal aircraft for this new carrier would be the Dash-8.

During that period, Air Canada engineered a takeover of Air Ontario. The De Luce family, which had owned Air Ontario for decades, was well experienced in serving a regional market. Before transferring its business to Air Canada, the De Luce family, in a move that showed foresight, acquired an imposing fleet of Dash-8s that

are particularly well suited to this type of market. It purchased some 30 Dash-8s, far more than Air Ontario required in order to meet its foreseeable needs.

In the past, when Air Ontario, Québecair and Nordair were competing in adjacent regional markets, they all tried to penetrate one another's territory, with little success. William De Luce, who was called as a witness, attributed the relatively unsuccessful attempt by Québecair and Nordair to penetrate the Ontario market, and by Air Ontario to penetrate the Quebec market, to a kind of regional chauvinism: Ontarians shunned Nordair and Québecair, and Quebecers shunned Air Ontario. This was the reason given by Peter Hill, Vice-President, Labour Relations at Air Ontario, for Air Ontario's swift abandonment of the attempt begun in the summer of 1986 to penetrate the Quebec market using Dorval as a base. At the time, Air Ontario had assigned crews to Montréal to serve a Montréal-Ottawa-London (Ontario) route. This temporary assignment was quickly abandoned when the service in question failed to meet its objective.

This aborted attempt to start up operations in Quebec is one of the grounds cited by the applicant for instituting these proceedings. In CALPA's opinion, the decision to have Air Alliance, and not Air Ontario, officially establish operations in Quebec was in fact a smoke screen designed to block CALPA's influence within Air Ontario, to the advantage of a non-unionized group established at Air Alliance. CALPA cited this aborted attempt in 1986 as proof of Air Ontario's real intentions.

In any event, when Air Canada decided it needed a regional carrier to serve Quebec, it deemed it advisable to create a new regional carrier that it named Air Alliance. It was initially established and financed directly from a line of credit guaranteed by Air Canada. Following its incorporation, Air Canada acquired 75% of its share capital and the remaining 25% was offered to and acquired by the De Luce family of Ontario. Objectively speaking, the share capital structure and ownership of Air Ontario and Air Alliance are the same.

Air Ontario employs nearly 200 pilots, while Air Alliance, which operates fewer than 10 aircraft, had a staff of 34 pilots in December 1988. Moreover, Air Alliance pilots intervened in these proceedings to oppose, on more than one ground, the consolidation of Air Alliance and Air Ontario. Since the creation of Air Alliance, the number of Air Ontario pilots has increased by approximately 40.

Air Alliance pilots point, among other things, to the cultural setting in which Air Alliance does business: Air Alliance is managed and conducts its routine operations in French. They argue that Air Ontario is a different business that operates in English. They further argue that CALPA has not demonstrated that it is really capable of and interested in representing groups made up of a majority of francophones, citing, among other things, the fact that despite all the years it has existed, CALPA still has no French-language version of its constitution and by-laws.

In specific cases, Air Alliance routes may cross or overlap some Air Canada or Air Ontario routes. However,

not one Air Ontario route came under the control of Air Alliance, and Air Ontario did not reduce the frequency of its flights. CALPA admits that there was no intermingling or transfer of employees between the two companies or any transfers, lay-offs or reduction of hours of work at Air Ontario.

When Air Alliance began operations, it used Dash-8s leased at market price from Air Ontario. Its pilots also received training given at a centre owned by Air Ontario. This centre for training pilots in the operation of Dash-8 aircraft is the largest of its kind in the world because Air Ontario owns the largest Dash-8 fleet. The centre is used by North American and foreign carriers alike. Pilot training has been and continues to be an Air Ontario commercial activity. Air Ontario has trained pilots for foreign or Canadian carriers, and this is why Air Alliance sent its first pilots there. Air Ontario did not treat Air Alliance pilots differently from any other pilot undergoing training. Moreover, Air Alliance paid for the training given to its pilots, at the rate normally charged in the circumstances.

Air Ontario pilots and their employer were involved in a bitter labour dispute in 1986-1987. According to CALPA, Air Alliance's presence makes it possible, in the event of a dispute, to serve certain Air Ontario routes and, over the longer term, creates pressure within the Air Canada family to downgrade the pilots' conditions of employment. The pilots regard this situation as a threat to and a direct attack on their bargaining rights. The evidence did not reveal any functional link between the labour relations services or policies of Air

Alliance and Air Ontario. Each operates its own business under the watchful eye of Air Canada, whose degree of intervention varies.

In reply to the intervening pilots' claim that it cannot represent them adequately in French, CALPA described its past and its involvement with Québecair's pilots. It described its own development; and on the language question, its counsel pointed out, among other things, that the association's constitution and by-laws were being translated at the time of the hearing.

On the question relating more specifically to labour relations, CALPA's executive had submitted to its components a resolution stating that Air Canada and all its affiliated carriers constituted a single employer and a single work, undertaking or business. Under CALPA's constitution and by-laws, if, in these circumstances, this type of resolution is adopted, the union itself, without the employers' participation, initiates a procedure to consolidate the seniority lists of all the carriers it considers to be a single employer. Once this strictly union initiative is completed, CALPA approaches the single employer in order to obtain its approval, in a collective agreement, of the seniority lists that have already been agreed to by its membership. CALPA cited a number of such initiatives that had succeeded in the past.

However, in the case of the Air Canada family, the most recent convention of CALPA did not adopt the proposal submitted by its officers. On the contrary, at the initiative of its largest component, the Air Canada pilots, CALPA had to postpone indefinitely the

consolidation of the seniority lists of Air Canada and its affiliates. The convention also instructed its officers not to apply to the Board for a declaration that Air Canada and its affiliates constituted a single employer within the meaning of section 35 of the Code. This explains why Air Canada was not named a respondent in these proceedings. However, nothing in the resolutions passed at the meeting prevented the union officers from filing a section 35 application covering only Air Ontario and Air Alliance. Counsel for CALPA added, since the provisions of section 35 of the Code gave the Board the power to add proprio motu a party to this proceeding, the Board could nevertheless decide, without CALPA's officially asking it to do so, to declare that Air Canada, together with Air Alliance and Air Ontario, constituted a single employer.

On the question of personnel, the evidence revealed that the number of Air Ontario pilots has increased since Air Alliance was created. In this regard, the president of the Air Ontario division of the applicant union argued that the creation of Air Alliance could weaken his union's position at the bargaining table. He recalled the many difficulties encountered with the De Luce family in the past, and with Air Ontario since, in concluding collective agreements. He went on to argue that if Air Ontario and Air Alliance were, in fact, one and the same business, Air Ontario pilots with many years of service, able to fly Dash-8 aircraft, had been prevented from doing so by the artificial creation of Air Alliance.

III

THE POSITIONS OF THE PARTIES

We have already summarized the applicant union's position. It cites the financial and operational structure of the broader Air Canada family in which the status of Air Alliance and that of Air Ontario are identical: Air Canada and the De Luce family own 75% and 25% respectively of each carrier, and certain administrators are common to both carriers. CALPA expects Air Alliance will be used to weaken its overall bargaining capacity. It points the finger at Air Canada as being ultimately responsible for the creation and structure of Air Alliance and for keeping it in a position of dependency.

Counsel for Air Alliance, for his part, stressed both the unique personality and characteristics of Air Alliance and the circumstances of its creation. He characterizes it as a business wholly separate from both Air Canada and Air Ontario. In his opinion, the evidence does not support a declaration of single employer since it was not established that there was common control between these five businesses. A declaration of single employer, counsel argued, would not produce the slightest benefit in terms of labour relations. He added that the market served by Air Alliance was in fact a new market, created by Air Alliance. The latter gained a foothold in a market that was previously served by Nordair or Québecair and that was wholly foreign to Air Ontario.

Counsel for Air Ontario, for his part, opposed the proceedings instituted by the union, citing both past experience and the present situation. Mr. Phelps argued that Air Ontario had been operating for decades and had never served the market now being served by Air Alliance or even attempted to serve it. He admitted that an experiment had been tried briefly during the past decade to see whether Air Ontario could hope to penetrate the Quebec market, but he stressed that this experiment had ended in failure long before Air Canada acquired Air Ontario. He argued that these proceedings did not meet the criteria set down in section 35 of the Code and that the Board could not make any findings against Air Canada which was not impleaded by the applicant, although CALPA was perfectly free to do so.

Finally, counsel stressed that it was not up to the Board in the circumstances to substitute itself for the applicant and impose findings on Air Canada and hence on his client indirectly, findings that a bargaining agent with CALPA's maturity, was capable of seeking itself.

The intervening pilots, for their part, cited traditional differences between the manner in which their profession is practised in Quebec and in Ontario. In their opinion, consolidating Air Alliance and Air Ontario would be tantamount to denying them any career opportunities. Were the Board to allow this application, it should at least declare that the Air Alliance bargaining unit is separate from the Air Ontario unit and order that a representation vote be held to determine whether CALPA enjoys any support within the Air Alliance group.

IV

THE DECISION

A number of aspects of the present case bring to mind the Air Canada case, supra.

In that case, the union representing Air Canada ground personnel asked the Board to declare that Air Canada and some of its affiliated carriers constituted a single federal work, undertaking or business and a single employer within the meaning of the Code. Subsidiarily, the applicant union asked that the existing relevant bargaining units at Air Canada, Air Nova, Air Ontario and Air BC be merged to form a single unit. CALPA intervened in those proceedings to oppose the applications, admittedly with nuances attached, but nonetheless, it opposed them (see Air Canada, supra).

Section 35 of the Code stipulates the following:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board, may after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single federal work, undertaking or business."

With respect to section 35, the Board must first ensure that all five criteria for making a declaration of single employer are met. If so, it must then determine the appropriateness, from the standpoint of sound labour

relations, of making a declaration like the one sought in the instant case. These five criteria were summarized as follows in Murray Hill Limousine Service Ltd. (1988), as yet unreported CLRB decision no. 699:

"In order for section 133 [now section 35] to apply, the following criteria must be met:

- 1. two or more enterprises, i.e., businesses,*
- 2. under federal jurisdiction,*
- 3. associated or related,*
- 4. of which at least two, but not necessarily all, are employers (Emde Trucking Ltd. [(1985), 60 di 66; and 10 CLRB (NS) 1 (CLRB no. 501)],*
- 5. the said businesses being operated by employers having common direction or control over them."*

(page 26)

Although there is no need to launch into a detailed description of how Air Ontario and Air Alliance are managed, the Board notes first that nothing has changed at Air Ontario since the decision in Air Canada, supra. That decision describes the situation at Air Ontario at the time of the events that are of concern to us here.

Moreover, the situation at Air Alliance, which was created from nothing by Air Canada, closely resembles the situation of Air Canada's affiliates as revealed to the Board by the facts presented in Air Canada, supra. In fact, like Air Nova, Air Alliance was created and developed with the assistance, if not at the direct initiative, of Air Canada.

Air Nova was not acquired by Air Canada. This new carrier was created and developed as part of Air

Canada's overall strategy. Air Canada owns 49% of Air Nova. Air Alliance was created in similar circumstances, but based on a concept developed within Air Canada itself, which owns 75% of Air Alliance. Similarly, as the facts presented in Air Canada, supra, also revealed, Air Canada owns all assets of Air BC, another of its partners.

It is clear, despite the carefully phrased remarks of some, that Air Alliance is managed in close co-operation with the management of Air Canada, whose head office, the Board notes in passing, is in Montréal, whereas Air Alliance's head office is in Québec, and Air Ontario's is in London, Ontario. The Board noted in Air Canada, supra, that management of the affiliated carriers was decentralized and that Air Canada's senior management, while exercising control, has given each carrier a large measure of autonomy.

In the instant case, the evidence dealt only with the management of Air Ontario and Air Alliance. The Board did not note any significant differences between the management of the two carriers in relation to Air Canada. Both are clearly subordinate to Air Canada, and Mr. Filiatreault admitted so quite candidly. Obviously, these two businesses ultimately must follow the direction adopted by Air Canada and could not, as it were, chart their own course without the approval of the parent company. Having said this, we did not find that there was any relationship of dependency between Air Alliance and Air Ontario or that the operation of one was subordinated to the operation of the other. In short, based on the evidence, Air Ontario, as a business and employer separate from Air Canada, has no particular

authority over Air Alliance. It has no more authority over Air Alliance than it would have over any other Air Canada partner. To comment any further on Air Alliance would be purely speculative, although the development of one would in all likelihood take into account the existence of the other, as is the case with all carriers affiliated with Air Canada.

If one were to draw an analogy with the automobile industry, the development of the various Air Canada affiliates could be compared to the different models produced by a large automobile manufacturer. For example, General Motors will not in all likelihood allow two GM dealers to compete in the same market, if GM's senior management feels that this market cannot support both dealers. Thus, if the carriers affiliated with Air Canada in theory, can compete in each other's markets, any attempt to verify this theory would not achieve anything more than marginal results.

There is no need, in the instant case, to examine in detail each of the criteria set out in Murray Hill Limousine Service Ltd., supra. In fact, there clearly are two federal works, undertakings or businesses, from the same industry, and both are employers within the meaning of the Code. What remains to be determined is whether these employers are subject to common control or direction. The Board has already decided that there is common direction and control of Air Ontario and Air Canada (see Air Canada, supra). Air Alliance's situation is clearly identical to Air Ontario's and, in this sense, it too is unquestionably subject to the direction and control of Air Canada, although it is not technically possible to make this finding in the instant

case since Air Canada is not impleaded. The Board must therefore determine whether there is common direction and control between Air Alliance and Air Ontario.

The applicant argues that, had Air Alliance not been created, the market served by Air Ontario would have expanded naturally into Quebec following the disappearance of Québecair and Nordair. The union further argues that the creation of Air Alliance, the structure of its share capital, its clear subordination to Air Canada and the presence of the De Luce family are all factors that warrant a finding of common control and direction.

The Board recognizes that Air Alliance and Air Ontario are in the same situation of dependency in relation to Air Canada. However, the Board has not determined that Air Alliance is subject to Air Ontario's control and direction. In fact, the Board has not determined that the influence that Air Ontario exercised over Air Alliance, if in fact it exercised any, was any different from the influence it could have had over Air Nova or Air BC, according to the decision in Air Canada, supra. Although both carriers are ultimately under Air Canada's control, their management, while certainly co-ordinated, is nevertheless parallel and separate. Insofar as the applicant did not seek any findings against Air Canada, there is no need to make any further conclusion in order to set aside the findings sought under section 35.

Our decision is inevitably influenced by the fact that Air Canada was not covered in the conclusions sought by CALPA. The union suggested that the Board could make Air Canada a party to the proceedings by exercising the

power conferred on it under section 35. CALPA's executive explainted its decision not to do so by a union decision directing it in practice not to seek any conclusions against Air Canada.

The Code clearly empowers the Board to set in motion section 35 at its initiative. We do not believe that this discretion should be exercised in circumstances like those of the instant case where a union decides, democratically, rationally, and clearly without any pressure from the employer, not to invoke a provision of the Code like section 35. In this situation, one cannot make an artificial distinction between the executive of the union and its components and refuse to view the inaction of the former as anything but normal compliance with the will of the latter.

Certainly, one can conceive of the Board's taking this initiative where inadvertently, through negligence, or through a kind of imposed timidity, a union does not take the initiative of invoking section 35 or using it to involve a party in a proceeding. The Board, however, would be very unlikely to do so where the alleged aggrieved party itself freely chooses, of its own accord, not to take this initiative. Within the various components of a union, one certainly can conceive of a less powerful local, like Air Ontario, being outmanoeuvred by a more powerful local like Air Canada. However, this cannot be deemed to constitute, as mentioned above, grounds for intervention. Under the Code, employees who feel they are the victims of some form of union intimidation have the right to seek and ultimately obtain redress. However, the Board does not feel obliged in such circumstances to substitute its

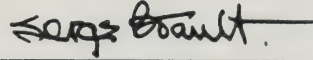
will for the freely expressed will of employees meeting in a democratically constituted convention.

Bearing these observations in mind, the Board carefully examined, in the context the proceeding, as instituted, the impact of the creation of Air Alliance on labour relations at Air Ontario. The evidence did not establish that the decision to create Air Alliance was influenced by any desire to limit the expansion of Air Ontario or compromise the bargaining rights acquired in respect of this carrier. Although the history of labour relations at Air Ontario may from time to time have cast doubt on the willingness of this business to deal with its employees within the framework provided for in Part I of the Code, the Board cannot conclude, based on the evidence heard, that this is the case at present. It is conceivable that had Air Alliance not been created, Air Ontario could have expanded into Quebec. However, to claim that it did not do so in order to evade its collective obligations to CALPA would be pure speculation.

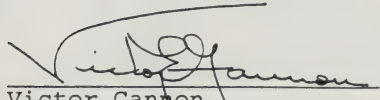
In the circumstances of this case, since the evidence did not reveal that there was any effort by the employer to undermine CALPA's bargaining rights at Air Ontario, or even that the creation of Air Alliance unintentionally produced this result, a declaration of single employer would not be appropriate.

As for the findings sought under section 18 of the Code, the evidence did not establish that it was appropriate to amend CALPA's certification.

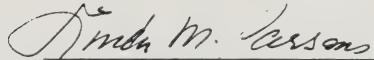
For all these reasons, this application is dismissed.



Serge Brault
Vice-Chairman



Victor Gannon
Member of the Board



Linda Parsons
Member of the Board

DATED at OTTAWA, this 19th day of June 1990.

CCRT/CLRB - 801

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Summary

MR. RÉJEAN LALANCETTE, COMPLAINANT,
THE UNITED TRANSPORTATION UNION,
LOCAL 1843, RESPONDENT, AND QUEBEC
NORTH SHORE & LABRADOR RAILWAY CO.,
EMPLOYER.

Board File: 745-3391

Decision no.: 802

The complainant alleged that the
respondent union breached its duty
of fair representation by failing
to refer his dismissal grievance
to arbitration in the prescribed
time limit.

The Board concluded that, by
ignoring the time limit set for
referring grievances to
arbitration, the union
representative, responsible for
processing grievances, was guilty
in the circumstances of this case
of serious negligence, tantamount
to unfair representation. The
Board dismissed the argument to the
effect that an agreement between
the parties allowing them to exceed
the time limit to refer a case to
arbitration existed.

The Board ordered the union to
refer the grievance to arbitration
and reserved the right to deal with
the issue of the responsibility of
the compensation to be paid to the
complainant, should the arbitrator
so decide.

Ce document n'est pas officiel.
Seuls les motifs de décision
peuvent être utilisés à des fins
juridiques.

Résumé de décision

M. RÉJEAN LALANCETTE, PLAIGNANT,
ET LES TRAVAILLEURS UNIS DES
TRANSPORTS, SECTION LOCALE 1843,
INTIMÉE, ET QUEBEC NORTH SHORE &
LABRADOR RAILWAY CO., EMPLOYEUR.

Dossier du Conseil: 745-3391

N° de Décision: 802

Le plaignant reproche au syndicat
intimé d'avoir manqué à son devoir
de représentation juste en omettant
de soumettre son grief de
congédiement à l'arbitrage dans les
délais prescrits.

Le Conseil a jugé que l'ignorance
par le représentant syndical,
responsable des griefs, de
l'existence d'un délai pour
soumettre un grief à l'arbitrage
constituait, dans les circonstances
de cette affaire, une négligence
grave équivalant à de la
représentation injuste. Le Conseil
n'a pas retenu l'argument du
syndicat voulant qu'une entente
permettant d'outrepasser les délais
de renvoi à l'arbitrage ait existé
entre les parties.

Le Conseil a ordonné au syndicat
de soumettre le grief à l'arbitrage
et a réservé sa juridiction au
sujet de la proportion dans
laquelle l'employeur, le syndicat
ou les deux devraient assumer le
paiement d'une indemnité au
plaignant dans l'éventualité où
l'arbitre l'ordonne.



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Reasons for decision

Mr. Réjean Lalancette,
complainant,
and
United Transportation
Union, Local 1843,
respondent,
Quebec North Shore &
Labrador Railway Co.,
employer.

Board File: 745-3391

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. François Bastien and Jacques Alary, Members.

Appearances:

Mr. Raymond Bérubé, representing the complainant, accompanied by Mr. Réjean Lalancette, complainant;

Mr. Richard Cleary, representing the United Transportation Union, Local 1843, accompanied by Mr. Berthier Arsenault, union representative; and

Mr. Denis Manzo, representing Quebec North Shore & Labrador Railway Co., accompanied by Mr. Albert Béliveau, director of labour relations.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair. They follow the interim decision of May 16, 1990 allowing Mr. Réjean Lalancette's complaint. The Board informed the parties, when it rendered this interim decision, that they would receive the reasons for its decision later. This document comprises these reasons.

I

The Remedy

The Board has before it a complaint alleging a contravention by the respondent union of section 37 of the Canada Labour Code.

Section 37 stipulates the following:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The Board received the complaint on October 12, 1989. The complainant alleges that the respondent flagrantly breached its duty of fair representation by failing to refer his dismissal grievance to arbitration within the prescribed time limits. This omission was considered decisive by the grievance arbitrator before whom the employer argued, by way of a preliminary objection, that the grievance was untimely, and he therefore dismissed the grievance in an arbitral award of September 15, 1989.

In his award, the arbitrator held that the union could not cite, in regard to the delay, either past practice or the doctrine of estoppel to justify its failure to refer the grievance to arbitration within the prescribed 60-day time limit. Upon reading this decision, Mr. Lalancette learned that because of the union's failure to follow the grievance procedure, he had lost his right to have his grievance contesting his dismissal decided on its merits. He then filed the instant complaint with the Board.

II

The Evidence

None of the parties summoned to appear at the public hearing held in Montréal on May 8, 1990 presented any oral evidence. They referred the Board to the documentary evidence on file, specifically the grievance arbitrator's award and the submission prepared by the union for the arbitration proceeding that dealt with the preliminary objection alleging that the grievance was untimely. The parties told the Board that this uncontested evidence set forth all the essential and relevant facts necessary to decide the matter at issue here.

The facts can be summarized as follows.

- Mr. Réjean Lalancette had been working for Quebec North Shore & Labrador Railway Co. for 20 years when he was dismissed on August 16, 1988. At the time, he was employed as a conductor.
- According to the record and the clarifications made at the hearing by counsel for the employer, Mr. Lalancette was dismissed for failing to report for duty. He was arrested and detained on April 13, 1988 after criminal charges were laid against him. He was sentenced to three years in prison on June 23, 1988. During the period between the date of his arrest and his release on day parole in January 1989, Mr. Lalancette was incarcerated.
- Between April 13 and July 20, 1988, Mr. Lalancette, who was unable to report for duty, took sick leave followed

by vacation leave. On July 11, 1988, Mr. Berthier Arsenault, general manager of Local 1843 of the United Transportation Union, in which capacity he was responsible for grievances, acting on Mr. Lalancette's behalf, asked the employer to authorize the complainant's absence. On July 20, 1988, the employer refused this authorization. At the time, Mr. Arsenault explained to the employer that Mr. Lalancette would be eligible for parole in a year, in June 1989, and possibly for day parole in six months, in December 1988, which would enable him to then resume his duties.

- When the employer refused to authorize the absence, it summoned Mr. Lalancette to a formal hearing, in accordance with the provisions of the collective agreement, so that he could explain his absence from work. This hearing took place on August 12, 1988, obviously in Mr. Lalancette's absence, but in the presence of two union representatives, including Mr. Arsenault. Following this meeting, the employer notified the complainant that his employment would be terminated on August 16, 1988.

- A grievance contesting this dismissal was filed on September 7, 1989. The employer's reply dismissing the grievance is dated September 16, 1988. The grievance was referred to the second step in the grievance procedure on October 10, 1988. In its reply at the second step, the employer advised the union that it was upholding its decision to dismiss Mr. Lalancette. This reply from the employer constituted the second and final step in the grievance procedure provided in article 18 of the collective agreement.

- The next step, reference to arbitration, is described in article 3 of the preamble to the collective agreement, which stipulates the following:

"3. All differences between the parties to this Agreement concerning its meaning or violation which cannot be mutually adjusted, shall be submitted to Canadian Railway Office of Arbitration for final settlement without stoppage of work. Such differences must be submitted to the Canadian Railway Office of Arbitration according to their rules of procedure unless the parties mutually agree in writing to delay proceedings before the Office."

(emphasis added)

- The rules of procedure of the Canadian Railway Office of Arbitration provide that any grievance involving a disciplinary measure or dismissal of which there is no final disposition under the grievance procedure provided in the relevant collective agreement shall be referred to arbitration, by means of a notice, in the manner and within the time limits prescribed, or if the collective agreement contains no such rules, within 60 days of the date the decision was rendered at the final step of the grievance procedure. In the present case, the time limit for referring Mr. Lalancette's grievance to arbitration was 60 days, commencing on October 13, 1988, the date of the employer's reply at the second step.
- On April 25, 1989, Mr. Berthier Arsenault asked Mr. Robert Béliveau, the employer's general manager, to prepare the joint statement of the parties in the case of Mr. Lalancette's grievance. Under the rules of procedure of the Canadian Railway Office of Arbitration, this joint statement must accompany the notice of request for arbitration. Mr. Béliveau refused to prepare the joint statement and informed the

union representative of the employer's intention to argue that Mr. Lalancette's grievance was untimely because it was not referred to arbitration within the prescribed time limit. In these circumstances, the union requested arbitration and made its own submission to the Office of Arbitration on July 11, 1989.

- In this submission, the union explained that Mr. Berthier Arsenault did not learn, until April 25, 1989, of the 60-day time limit prescribed in the rules of procedure of the Canadian Railway Office of Arbitration. Mr. Arsenault was assistant manager of the respondent union from 1984 to 1988 before becoming its general manager in May 1988. For his part, Mr. Jacques Roy, general manager of the union in 1977-1978 and from 1981 to 1988, indicated, in a sworn statement, that all during this time, there was tacit agreement between the parties that the 60-day time limit was not a strict one.
- The arbitral award rendered by Michel G. Picher relates all of the above-described facts. It also addresses the union's claim that the parties to the collective agreement traditionally disregarded the time limits prescribed for referring disputes to an arbitrator and hence, that on a number of occasions, these time limits were waived, without any regrettable consequences. The arbitrator rejected this claim and the union's other argument concerning the application of the doctrine of estoppel. According to the arbitrator, the facts did not confirm the existence of a tacit and general agreement not to apply or observe the time limits for referring disputes to arbitration. On the contrary, the evidence established that although this time limit

was routinely extended, this was always done at the union's request or by agreement of the parties. In Mr. Lalancette's case, no request was made or agreement reached to extend, in any way, the 60-day period that began on October 13, 1988. Consequently, the arbitrator dismissed Mr. Lalancette's grievance without examining its merits because it was not referred to arbitration within the prescribed time limits.

- Mr. Réjean Lalancette was granted day parole effective December 23, 1988. Mr. Arsenault informed the employer of this fact during the week of December 18, 1988. In practice, this day parole took effect on January 25, 1989. Mr. Lalancette was granted full parole on July 26, 1989.

III

The Decision

The Board must determine whether the union, in failing to refer the grievance to arbitration within the prescribed time limits, breached its duty of fair representation under section 37 of the Code.

This legislative provision has been the subject of numerous Board decisions. These decisions have established criteria and standards by which to assess the conduct of unions in meeting the requirements of section 37 of the Code. In Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, the Supreme Court of Canada summarized in five points the main components of the duty of fair representation:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(page 527)

The present case illustrates in a particularly obvious manner the union's obligation to act with competence, without serious or major negligence.

At issue here is whether the fact that Mr. Berthier Arsenault, general manager of the union and the person responsible for grievances, was unaware that there was a time limit for referring grievances to arbitration constitutes a breach of the obligation of a trade union to act with a minimum of competence in defending the interests of an employee in the bargaining unit in circumstances like those of the present case. In other words, did Mr. Lalancette lose the right to have the grievance arbitrator decide the merits of his dismissal as the result

of serious negligence or arbitrary conduct on the part of the bargaining agent, contrary to section 37 of the Code?

The union argues that the fact that Mr. Arsenault was unaware of the 60-day time limit does not mean that he acted in an arbitrary or discriminatory manner or in bad faith. On the contrary, the union argues that he always intended to defend fully and completely the complainant's interests: he filed a grievance, ensured that it proceeded through the various steps in accordance with the provisions of the collective agreement, and never intended not to proceed to arbitration with the grievance. His failure to refer the grievance to arbitration within the prescribed time limits was a simple administrative error and could not constitute a contravention of section 37.

The Board does not accept this reasoning. It is inexcusable for a union representative who served for more than four years as assistant manager and then as manager of the local in question, in which capacity he was responsible for grievances, not to know inside out the grievance and arbitration procedure negotiated by the parties in respect of the bargaining unit for which the union is certified. The union provided no valid explanation as to why the union officer responsible for applying the applicable rules of procedure was unaware of them. The union plainly and simply stated that Mr. Arsenault did not know that there was a time limit. Ignorance is no excuse. For at least four years, Mr. Arsenault was involved in the administration of the union and attended meetings of its various decision-making authorities where grievance cases, among other things, were discussed. He should therefore have been familiar with at least the elementary aspects of this procedure. The union should have made sure that its representative with

responsibility for grievances possessed this very rudimentary competence. There is no excuse for this state of affairs.

In its defence, the union tried to show that this time limit was not always strictly applied by the parties. This argument was rejected by the grievance arbitrator because the union failed to provide any examples where this happened.

The union further argued that failing to refer the grievance to arbitration within the prescribed time limit did not prejudice Mr. Lalancette's rights because there was no urgency in proceeding to arbitration so long as Mr. Lalancette was not available to attend the arbitration hearing. This is a rather flimsy argument. To begin with, the union was aware at the very outset that Mr. Lalancette would be eligible for day parole in December 1988 and had known since mid-December 1988 that his day parole would take effect on December 23, 1988. (In practice, his day parole did not take effect until January 25, 1989, but this fact has no bearing on the instant case.) And it did nothing. Not until the end of April, three months after Mr. Lalancette became available, did the union consider referring the grievance to arbitration. The availability of an employee is no defence for the conduct of a union. If, in the course of an arbitration proceeding, problems arise regarding the availability of one or another of the parties to the proceeding, then these problems must be addressed in due course. The bargaining agent's full compliance with the grievance procedure does not depend on the physical presence of employees. On the contrary, where, as in the instant case, the employee involved is unable to handle his own affairs and, for all practical purposes, can

only rely on third parties to protect his interests, the union must be very far-sighted in its conduct. No evidence was adduced to explain why the union waited so long to act when what was clearly required was diligence.

The approach adopted by the Board in Cuthbert C. Miller (1987), 72 di 101 (CLRB no. 662), applies here. In that particular case, the union had failed to file a grievance to contest the dismissal of an employee because the employee had not met certain administrative requirements. However, since the evidence established that the complainant's inaction was the result of a directive from the employer, the Board made the following finding:

"... It is our unanimous determination that the union did not. In an issue as critical as this, where a job was at stake, it was incumbent on the union to take every step available to it to protect the complainant's interests. ..."

(page 106)

In this case, the union did not do everything necessary to protect the complainant's interests. It displayed incompetence and negligence in the way it handled Mr. Lalancette's grievance contesting his dismissal.

In Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271), the Board held that a simple administrative mistake made in good faith does not constitute a breach of the duty of fair representation. It said the following:

"In this case the union made an unintentional and not fully explained administrative mistake in its Toronto office when actively prosecuting the cause of the merits of an employee's discharge against her employer. This is not a case where the union failed to act or failed to count the days. It acted but in so doing made a mistake. ..."

(pages 307; 510; and 409)

In the instant case, the theory of the simple administrative mistake does not apply. The union representative's failure to send the notice of arbitration within the prescribed time limit, his ignorance of the technical aspects of the procedure having been cited as the reason for his omission, does not constitute a simple administrative mistake.

In Brenda Haley, supra, the Board expressed the following opinion:

"... They do this in a social and economic context where a lack of funding, education, staffing and participation is a real, everyday fact of life. In this context, we do not deduce it to have been Parliament's intention to impose upon the unions the responsibility for the consequences of all their errors no matter how unintentional they are. ..."

(pages 305; 509; and 409)

Although the Board shares this opinion, it nevertheless believes that there are certain errors that unions cannot commit without breaching their duty of fair representation, despite the constraints inherent in the nature of these organizations and their method of operation. One of these errors is serious negligence.

In reviewing in plenary session its initial decision in Brenda Haley, supra, the Board held that serious negligence in the bargaining agent's conduct is a form of unfair representation that contravenes the provisions of the Code. In its second decision in Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304), the Board had the following to say on this subject:

"For us the gravity of the grievance is clearly important. This is reflected in our utilization of the notion of a critical job interest. The level of expertise of the union representative and the resources the union makes available to perform the function are also relevant factual considerations. These and the other relevant

facts of the case will form the foundation in each case to decide whether there was seriously negligent, arbitrary, discriminatory or bad faith, and therefore unfair, representation. This individual judgment must be made on the facts of each case. We make no rule about missed time limits or other procedural error in any circumstance being serious negligence. ..."

(pages 326; 133; and 616)

There is no doubt in the Board's mind that in the instant case the union's conduct amounts to serious negligence. Three factors, among others, lead the Board to conclude that the union contravened section 37 of the Code: first, the cavalier attitude adopted by the bargaining agent, given the serious and urgent nature of the grievance filed by Mr. Lalancette, who was not only dismissed, but also incarcerated; second, the inexplicable (and unexplained) ignorance of the arbitration procedure on the part of an experienced union official; and, finally, the union's inability to prove the existence of a past practice that could have justified non-compliance with the 60-day time limit.

In closing, it is appropriate to refer to Denis Pion et al. (1981), 43 di 254 (CLRB no. 312), which is similar in many respects to the present case. In that particular case, the Board held that the conduct of the union, which had omitted to refer 18 grievances to arbitration within the prescribed time limit, contravened section 37 of the Code. These grievances concerned the payment of overtime. As a first step, the union had correctly applied the grievance procedure and, as a second step, decided to refer the grievances to arbitration. However, the president of the union subsequently forgot to do so "due to the extremely heavy workload in the office at this time."

The arbitrator dismissed the grievances, noting that the time limits prescribed by the collective agreement were imperative. The Board had the following to say regarding circumstances that might justify a union's not acting or failing to act within the prescribed time limits:

"The Board recognizes, among other things, that an exceptional overload of work could lead to such omissions. However, without specific, detailed evidence rather than a general allegation to this effect, the Board concludes that the council of trade unions breached its duty of fair representation and contravened the provisions of Section 136.1 [now 37] of the Code. To find otherwise in such circumstances would be tantamount to inviting unions to renounce this duty, and would make the scope of Section 136.1 meaningless. When a union decides to take a grievance to arbitration and, for some reason, forgets to refer the said grievance, the union in question must submit evidence regarding the reason."

(page 262)

The Board's finding in that decision applies in the instant case. If omitting to refer a grievance to arbitration within the prescribed time limits constitutes, other than in exceptional circumstances, a breach of the duty of fair representation, then all the more reason to conclude that ignoring these time limits, let alone forgetting about them, constitutes a serious breach of this duty.

For all these reasons, the Board granted Mr. Lalancette's complaint in a letter decision of May 16, 1990.

In this letter decision, it made the following orders:

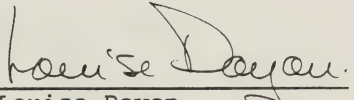
- orders the union to refer immediately to arbitration Mr. Réjean Lalancette's grievance of September 7, 1988 contesting his dismissal so that the arbitrator can render a decision on the merits in the light of the provisions of the collective agreement, and to this end, waives the time limits specified in the collective agreement for referring this grievance to arbitration;

- orders the union to assume the legal fees and reasonable expenses incurred by the complainant in order to be represented in the present proceeding;
- orders the union to assume the legal fees and reasonable expenses that the complainant will incur with respect to the preparation and hearing of his grievance before the arbitrator, should the complainant choose not to be represented by counsel for the union at the grievance arbitration hearing;
- orders the union to cooperate with the complainant and his counsel to ensure that the grievance is heard and decided as expeditiously as possible.

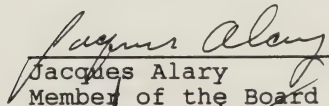
The Board added the following concerning the possible payment of compensation to Mr. Lalancette:

"Should the grievance arbitrator decide that compensation is to be paid to the complainant as the result of his dismissal, the Board reserves the right to determine the amount of the compensation to be assumed by the union, or by the employer, or by both, as the case may be ..."

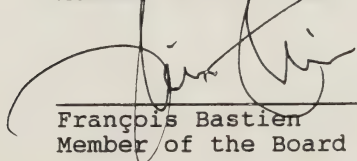
This decision is unanimous.



Louise Doyon
Vice-Chair



Jacques Alary
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 19th day of June 1990.



information

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Summary

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, APPLICANT, AND GLENGARRY TRANSPORT LIMITED, EMPLOYER.

Board File: 555-2845

Décision No.: 803

This case deals with the issue of employee status of dispatchers and foremen working for GTL Transport (1989) Inc. and with the appropriateness of the unit sought.

The Board determined that the dispatchers and the dock foremen are employees within the meaning of the Code. It also determined that the appropriate unit was the one comprised of employees working in the terminals of the Eastern region rather than the unit sought by the union. A vote was ordered pursuant to Section 29(2) of the Code.

Finally, the Board concluded that the single employer declaration made under Section 35 of the Code with regard to another certified bargaining unit of this employer is not applicable in the instant case.

Ce document n'est pas officiel. Les motifs de décision seulement peuvent être utilisés à des fins juridiques.

Résumé de Décision

SYNDICAT INTERNATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES UNIS DE L'ALIMENTATION ET DU COMMERCE, REQUÉRANT, ET GLENGARRY TRANSPORT LIMITÉE, EMPLOYEUR.

Dossier du Conseil: 555-2845

Décision n°: 803

Cette décision traite du statut d'employé des contremaîtres et répartiteurs à l'emploi de GTL Transport (1989) Inc. et du caractère approprié de l'unité recherchée.

Le Conseil détermine que les répartiteurs et les contremaîtres de quai sont des employés au sens du Code. Il détermine également qu'une unité regroupant les employés oeuvrant dans les terminaux de la région Est est appropriée plutôt que l'unité de terminal recherchée par le syndicat. Un scrutin a été ordonné conformément aux dispositions du paragraphe 29(2) du Code.

Enfin le Conseil a décidé que la déclaration d'employeur et d'entreprise uniques faite précédemment en vertu de l'article 35 du Code à l'égard d'une autre unité de négociation accréditée auprès de cet employeur n'est pas applicable à la présente affaire.



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Reasons for decision

United Food and Commercial
Workers International Union,

applicant,

and

Glengarry Transport Limited,

employer.

Board File: 555-2845

The Board was composed of Mr. Marc Lapointe, Q.C., panel Chairman, as well as Mr. J. Jacques Alary and Ms. Ginette Gosselin, Members.

Appearances:

Mr. Michael Cohen, for the applicant; and

Mr. Ronald J. McRobie, for the employer.

These reasons were written by Ms. Ginette Gosselin, Member.

This case deals with an application for certification filed on September 14, 1988 by the United Food and Commercial Workers International Union (UFCW) seeking to represent all dispatchers, dock foremen and assistant dock foremen, as well as garage foremen and assistant garage foremen employed by Glengarry Transport Limited (GTL) at its Pointe-Claire, Quebec, terminal. The evidence adduced reveals that a majority of the employees in question wanted the union to represent them as their bargaining agent.

An initial application covering among others employees performing these duties had already been filed in the Spring of 1988. The Board at that time issued a certificate to the applicant certifying it to represent the office employees in the Montréal terminal, but excluded dispatchers, foremen and assistant foremen, considering that this would not be an appropriate unit. However, the Board did not rule at that occasion on the employee status of the dispatchers, foremen and assistant foremen.

The employer opposed the Board granting the instant application for two reasons. First, the dispatchers, foremen and assistant foremen are management employees and cannot be considered employees within the meaning of the Code. Second, the employer considers the unit sought inappropriate because this unit represents employees at a single terminal in an enterprise that has several terminals. At the hearing, the employer also argued that this unit was even more inappropriate because of changes that had occurred within the enterprise in the interim.

The file was completed in June 1989. The hearing that had originally been scheduled for November 28 and 29, 1989 was ultimately held on February 12 and 13, 1990.

The Enterprise at the Time the Application Was Filed

At the time the application was filed, GTL operated a trucking enterprise with its head office in Alexandria, Ontario. The division that is of interest to us consists of 11 terminals and 4 garages and employs about 750 employees. The other division, referred to as the "full-load division," is not involved by the application. GTL is

part of the Glengarry Group, a company that includes several other trucking businesses.

The employees covered by the application work for Glengarry's operations division. This division covers vehicle maintenance and operations as such, that is, the transportation of goods.

For the purposes of its transportation of goods activities, GTL is divided into two regions, each one headed up by a regional operations manager. These managers come under the operations branch, whose offices are located in Alexandria. The western region, managed from the Toronto terminal, covers that terminal and the terminals in Cambridge, Hamilton, London, Oshawa, Belleville and Kingston. Fifteen dispatchers, dock foremen and assistant dock foremen work in these terminals. The eastern region, managed from the Montréal terminal, also covers the terminals in Brockville, Ottawa and Alexandria. Twenty dispatchers, dock foremen and assistant dock foremen work in those four terminals; three are assigned to central dispatching in Alexandria. Each terminal is headed up by a manager who also has, if necessary, an assistant manager.

There are no regional subdivisions for the maintenance activities. They are all performed out of Alexandria by the maintenance manager, who directs the activities of the company's four garages. The Alexandria and Ottawa garages employ a foreman; those in Montréal and Toronto have a foreman and an assistant foreman.

The enterprise has since undergone changes, which to a great extent explain the interval between the filing of this application and the Board's decision.

Everything started in late autumn 1988 when the Glengarry Group undertook a reorganization and updated the division of transportation activities among its various enterprises. In the summer of 1989, the restructuring of the enterprises in the group was completed: GTL absorbed two of the Group enterprises, i.e. Thibodeau Finch and Transport Intrabec. It transferred its full-load division to XTL, an independent enterprise within the group. GTL is now called GTL Transport Inc. (1989).

The Enterprise at the Time of the Hearing

GTL Transport Inc. (1989) now has about 1000 employees. The head office is still in Alexandria, but many of its management activities have been moved. For example, rate-setting, marketing and central dispatching are now carried out and managed from Montréal, and sales management is now done out of Toronto. GTL now operates 19 terminals and 8 garages.

The employees covered by the application are still part of the operations division of the enterprise, which covers vehicle maintenance and transportation of goods.

The regional east-west subdivision still exists within Glengarry with respect to its transportation activities. Each division is headed up by a regional operations manager, who is assisted by a manager in each terminal.

The western region, which is managed from the Hamilton terminal, includes six other terminals located in Detroit, Windsor, London, Oshawa, Belleville and Kingston. It employs 19 dispatchers and dock foremen (excluding those in Detroit).

The eastern region is managed from the main terminal in Montréal and includes 10 terminals located in Québec, Arthabaska, Danville, Sherbrooke, Trois-Rivières, Saint-Hyacinthe, Drummondville, Saint-Zotique (Montréal), Alexandria and Ottawa. Twenty-two dispatchers and dock foremen work in these terminals. Several terminals employ only a few people who perform functions covered by the application. For example, the Québec terminal employs only one dispatcher. In some small terminals there may be only one person acting as manager and dispatcher.

It is also common in both regions for one person to act as dispatcher and dock foreman.

Since the reorganization, the terminals in Toronto and Montréal (at 151 Reverchon, Pointe-Claire) no longer come under the regional operations manager. They are headed up by a manager who, like the regional managers, reports to the vice-president of operations. The Toronto terminal employs 12 dispatchers, dock foremen and assistant dock foremen. The Montréal terminal employs 16. This subdivision depends more on the volume of business than on the type of business. These two terminals still conduct only local business, as is the case in the terminals operating under a regional manager. In addition, five dispatchers at the Montréal terminal are assigned to central dispatching. This central dispatching function comes under neither the regional

manager nor the terminal manager, but has its own manager who reports directly to the vice-president of operations.

Vehicle maintenance work has increased. The enterprise now has eight garages. A foreman heads the garages in Windsor, London, Toronto, Montréal and Arthabaska, while a supervisor manages the Trois-Rivières, Sherbrooke and Ottawa garages (in Ottawa he is also the only employee). All these people report to Mr. Braatz, the maintenance manager. His office is located in Windsor, but he regularly visits all GTL garages. As a general rule, he goes to the "big garages" twice a month and to the smaller garages every six weeks. The maintenance manager reports to the vice-president of operations, as do the regional managers and terminal managers in Montréal and Toronto.

Organization of Industrial Relations

The changes that have occurred in the enterprise have had an impact on the employees and their unions.

At the time the application was filed, the applicant was certified to represent two bargaining units at GTL: one industrial unit consisting of drivers and warehouse and garage employees, and the other comprised of office employees in Montréal. In addition, various Teamsters locals were certified to represent drivers and warehouse employees of GTL's sister companies within the Glengarry Group. Reorganization and division of transportation activities within the Glengarry Group had become increasingly frequent, and so UFCW asked the Board to declare all enterprises within the Group to be a single employer within the meaning of section 35 of the Code. In

the circumstances, it had become very difficult, not to say impossible, to apply the collective agreements covering the drivers and warehouse and garage employees. A little later, the Canadian Council of Teamsters joined UFCW, and the two unions filed a joint application to this effect. Following an investigation, the Board granted that application. In May 1989 GTL (including its Torque Transportation Inc. division), XTL Transport Inc., Truck-It Transport Inc., Thibodeau-Finch Express Inc., Transport Intrabec 1986 Inc. and Transport TF Québec Limitée were declared a single work, undertaking or business and a single employer (Board file no. 560-208).

The Canadian Council of Teamsters was certified to represent all drivers and warehousemen employed by this single employer following a vote of the employees involved.

There is, and there previously was, no human resources department at GTL. This service is provided by the Glengarry Group to all its member companies. The on-going application of the collective agreements, like the day-to-day direction of operations, is handled by the managers and assistant managers in the terminals. The maintenance manager and foremen perform these duties in the garages. The Glengarry Group human resources department is called upon to establish general policies, impose disciplinary measures, conduct collective bargaining, and so on, for all cases in which the employer representatives must make decisions that could have implications for all companies.

Duties of Employees Covered by the Application

The changes that occurred in the enterprise had little impact on the duties performed by these people. What did change for some employees was the place of work, since some terminals shut down and others opened.

Dispatchers

Dispatchers receive orders for the transportation of goods. They then decide, according to the specific requirements of each order, the required vehicle for delivery or pick-up and choose the driver. They always perform these duties at the same terminal under the authority of the terminal manager. They do not have to travel in order to perform their work, but they occasionally contact dispatchers in other terminals to complete the transportation of goods.

Dispatchers assign work to drivers in order of seniority, and loads on the basis of the standards and regulations in effect in the industry, i.e. total weight of the load per truck, nature of goods to be transported, and so on, and of course on the basis of maximum productivity.

The dispatchers' work greatly affects the drivers' work. The dispatcher is the one who decides each day how many drivers are going to work, and authorizes overtime when necessary. In addition, he may be consulted when required in dealing with the application of the drivers' collective agreement, for example, in settling grievances concerning work distribution, or with the imposition of disciplinary measures.

Dispatchers cannot hire or fire employees. They do not sit on bargaining committees or any other labour-management committee, nor do they have access to employee records.

The duties and responsibilities of dispatchers assigned to central dispatching are similar with the exception that they handle the movement of equipment between the enterprise's various terminals.

Dock Foremen

The dock foreman, and assistant dock foreman where there is one, is responsible for the sorting of goods. He supervises and organizes the work of the warehousemen assigned to loading and unloading trucks. He performs these duties under the authority of the terminal manager. Particularly, the foreman must ensure that goods are protected and that departure schedules and productivity standards are met. He must also ensure that the rules governing the method of loading trucks are followed.

The dock foreman is the one who decides from day to day how many warehousemen he needs. He authorizes overtime when necessary. He allocates the hours of work among the warehousemen in accordance with the provisions of their collective agreement. As do the dispatchers in respect of drivers, he is consulted when required in dealing with the application of the collective agreement.

The dock foremen cannot hire and fire employees. They do not sit on bargaining committees, but they are consulted during preparations for bargaining. They do not sit on any

other labour-management committee and do not have access to employee records.

Where there are assistant foremen, they share these duties with the foreman or perform them in his absence.

Garage Foremen

The garage foreman is responsible for the day-to-day operation and administration of his garage. As we mentioned above, there are no managers in the garages. The foremen report directly to the maintenance manager whose offices are in Windsor. While the garages are closely connected to the terminals, since goods originate in the terminals, they operate independently from the terminals.

The foreman manages the day-to-day operations of his garage within the budget allocated to him by general management. The company's vehicles are maintained periodically, and the foreman has little control over this activity. He may, however, authorize unforeseen repairs of up to \$500 per day per vehicle. Above this amount, he consults with the maintenance manager. Based on the needs of the company's transportation business, he decides the order in which the vehicles that stop at his garage will be checked and repaired.

The foreman monitors and supervises the mechanics and assistants. He does not hire garage employees himself, but he conducts selection interviews. He is responsible for applying the collective agreement and may impose disciplinary measures other than dismissal. Dismissal is

the responsibility of the human resources department. Finally, he keeps employees' personal records in his office.

The Position of the Parties

The employer and the union acknowledge that the unit in question consists of persons who supervise and monitor other employees. They further acknowledge that the garage foremen perform these functions in a greater proportion and to a greater degree than do dispatchers and dock foremen.

However, the employer argues that in all cases supervision and monitoring are carried out to a sufficient degree that these persons cannot be considered employees within the meaning of the Code. They all take part, in varying degrees, in the disciplinary process in respect of the employees they supervise, and they have considerable autonomy in organizing their work.

The employer also contends that the proposed bargaining unit is not appropriate. It considers that if a terminal or city unit were certified now this could result in the creation of a large number of small units within its enterprise, since it now has 19 terminals. It also argues that such a unit is not viable, given the mobility demanded of people in these positions. It also questions whether foremen and dispatchers have common interests. Finally, the employer submits, without however having adduced evidence on this point, except with respect to the existence of a common human resources manager position, that the Board's declaration of single employer made in May 1989 with respect to the drivers and other employees bargaining unit applies to this case.

According to the union, none of the people covered by the application perform management functions to a degree that would justify they be deprived of the right to unionize. All, including garage foremen, work within a budgetary framework decided by other persons, apply company directives and have no authority to hire or fire.

On the issue of appropriateness, the union submits that, while the unit sought is not the most appropriate one, it is appropriate, and that this is its only obligation in this respect under the Code. Furthermore, the Board has often found to be appropriate units consisting of employees in one city or one work place in enterprises that had employees throughout the country. The union argues that the mobility required of dispatchers and foremen is not in this case a determining factor: the mobility is voluntary and has been caused largely by terminals being moved, and it is very minor in comparison with the mobility required of truck drivers. The union further submits that the persons covered by the application are part of a group that has been little affected by unionization, and that the Board must assess its criteria with this fact in mind. Subsidiarily however, it suggests that a unit consisting of all such employees working in Quebec would be appropriate. The geographical scope of such a unit would be identical to the scope that existed when the application was filed, since the Montréal terminal was then the only one in this GTL division in Quebec. However, it would then be necessary to order a vote, as GTL now operates 11 terminals in that province.

Finally, the union submits that the Board's declaration of single employer applies only to the unit dealt with in that Board decision.

The Status of Persons Covered by This Application

The employer contends that the dispatchers and foremen it employs are not employees within the meaning of the Code, that is, they may not belong to a union.

Section 3 of the Code defines "employee" as follows:

"'employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."

Section 27(5) further provides the following:

"27.(5) Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining."

That is, persons who supervise other employees may belong to a bargaining unit.

In all cases where the question of employee status arises, the Board has the power to decide such status.

"16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

...

(ii) a person performs management functions or is employed in a confidential capacity in matters relating to industrial relations, ..."

The Board has frequently exercised this power; see British Columbia Telephone Company (1977), 33 di 361; [1977] 2 Can LRBR 385; and 77 CLLC 16,107 (CLRB no. 98), inter alia. In that case the Board decided that level I supervisors were employees within the meaning of the Code:

"... Particularly in a large enterprise, many persons may wield some measure of authority over other employees without necessarily performing management functions such as would warrant their being excluded from the protection and benefits of the Code. Yet, in some cases, the nature of their work may be such that they cannot and should not be included in the same bargaining unit as the employees they supervise. To include them in the same unit might make it difficult if not impossible for them to continue to perform their job effectively. Their presence in a bargaining unit of employees they supervise might also inhibit the employees in the exercise of their rights under the Code. These are undoubtedly important considerations. Yet, they need not only be resolved by a ruling that a person is not an 'employee' with resulting deprivation of the protection of the Code. As long as the persons involved do not truly perform 'management functions', these legitimate interests can be accommodated by the creation, where this is appropriate, of separate 'supervisory' units."

(pages 376-377; 397; and 650-651)

The Board had earlier distinguished between management functions and supervisory functions.

"... There are numerous functions which are recognized as being 'management functions': the preparation of the budget, decisions as to the organization of the enterprise and staffing levels, the representation of the employer in collective bargaining or in contract administration, the formulation of corporate policy, the hiring, firing, promoting and disciplining of employees, authorizing time off or overtime, etc. Some of these functions are so important that they warrant a finding that a person performs management functions even if that person exercises only a few of these functions or does so only infrequently. Others are of lesser import and will not warrant a finding that a

person performs management functions unless they represent a major component of the person's job."

(pages 376; 396; and 650)

And much earlier, in Western Stevedoring Company Limited (1974), 6 di 48 (CLRB no. 27), the Board outlined for the first time its interpretation of section 27(5), which was introduced in the Code in 1973. It said:

"This Board therefore wishes to emphasize that although it agrees in part with the Argument of Counsel for the Respondent that a key to resolving this case is in a very close analysis of the degree of performance of management functions by the persons sought to be represented by the Applicant, degree meaning both 'intensity' and 'frequency', ...

We believe also that there is a third dimension: the number and relative importance of those of the management functions which a particular individual performs with frequency and with intensity.

But prior to applying these tests, one must determine what one has to apply the tests to. In other words, what are the management functions. What is the performance of management functions?

Once that is determined and a certain relative importance is placed on these functions, one must ask what are the management functions which are being performed by the incumbents of the positions sought to be certified, that are performed to a 'significant degree' in intensity and frequency and how relatively important they are per se and as opposed to the balance of the functions exercised or performed."

(page 56)

This approach has been upheld since in Cape Breton Development Corporation (1986), 67 di 203 (CLRB no. 595); and Voyageur Colonial Limited (1986), 64 di 167 (CLRB no. 563), and it is this approach that this Board intends to follow.

The parties acknowledge that the monitoring and supervision functions performed by garage foremen may be distinguished from those performed by dispatchers and dock foremen. The Board agrees. We shall therefore first examine the duties

of dispatchers and dock foremen, and then return to the garage foremen.

The Board acknowledges at the outset that these persons occupy positions that involve significant responsibilities and require specialized knowledge. However, these are not the determining factors. The Code also implicitly recognizes this, in that section 27 provides for the certification of units of professional employees. Moreover, just about everyone knows that doctors, engineers, air traffic controllers and so on are unionized, and no one could deny that these positions involve significant responsibilities and require highly specialized knowledge.

The determining factors are rather those we referred to above. It emerged from the evidence that although dispatchers and dock foremen are on the "firing line" almost none of these factors are present. The terminal manager or assistant manager is the one who performs management functions in the terminal. For these reasons, the Board finds that dispatchers and dock foremen employed by GTL are employees within the meaning of the Code.

Garage foremen perform functions similar to those carried out by dispatchers and dock foremen, but to a different degree. The way in which the maintenance department is organized requires that garage foremen be, at the same time and on a daily and on-going basis, the first and final management and supervisory level at the work place.

Since they are the only employer representatives on site, foremen are necessarily very involved in discipline at the garage. They cannot dismiss - this authority is reserved

to the human resources manager throughout the enterprise - but they may impose other disciplinary measures. They respond to employee grievances at the first step of the procedure and have access to employees' personal records.

In addition, while the maintenance manager visits the garages regularly and communicates with foremen as needed, nonetheless their activities in managing the garage are more in the nature of those of a terminal manager than of those of a dock foreman. The organization chart confirms this. Since there are no managers in the garages, foremen report directly to the maintenance manager, whose offices are in Windsor and who reports to the vice-president of operations, as do regional managers.

For these reasons, the Board finds that garage foremen employed by GTL are not employees within the meaning of the Code.

Whether the Proposed Unit is Appropriate

Pursuant to the Code, the Board is empowered to determine appropriate units.

"27.(1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining."

In its decisions the Board has restated and developed the criteria to be considered in determining the appropriate unit: Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59); Cablevision Nationale Ltée (1978), 25 di 422; and [1979] 3 Can LRBR 267

(CLRB no. 135); and Feed-Rite Ltd. (1978), 29 di 33; and [1979] 1 Can LRBR 296 (CLRB no. 157). Among these criteria, we would note those that are involved in the present case: common interests, viability of the bargaining unit, employee wishes, and territorial scope of the employer's activities. From these decisions, and from other decisions that followed, it is also clear that the Board does not have to determine the most appropriate unit, but rather a unit that is appropriate. In Royal Bank of Canada, Gibsons Branch (1977), 26 di 509; and [1978] 1 Can LRBR 326 (CLRB no. 111), the Board pointed out that each case turns on its facts and must be decided in its specific context.

What is the situation here? The unit sought by the union now consists of the employees of one terminal. The employer argues that such a unit is not appropriate; dispatchers and dock foremen share very few interests and, particularly, if a single terminal unit is certified, it will have to bargain with a host of small units in future. It submits that only a unit composed of the employees of all terminals is appropriate, given the nature of the enterprise involved. And it argues that, since the Board declared in May 1989 that GTL was, with other enterprises, a single employer and a single work, undertaking or business for the employees who belong to the drivers and other employees unit, this single employer is now the employer of the employees covered by the application.

While declaring a single employer as the employer of the employees covered by the application might not affect whether or not the unit is appropriate, the Board must nonetheless be careful to name the proper employer. For

this reason we shall now dispose of this question and then determine the appropriate unit.

That decision involving GTL was made subsequent to the filing of this application. While the Board must allow an application for certification when all requirements are met, it must also take into account changes that have occurred since the filing of the application to ensure that its decision will apply.

Section 35 of the Code provides:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

This section clearly provides that the Board has discretion, and the Board has so held in its decisions:

"In addition to the criteria discussed above, there must be an evident purpose, in terms of industrial relations, for the Board to join together companies it finds related and under common direction and control. A declaration under Section 133 is not merely an academic exercise. The interest of the employees concerned and sound labour management relations must warrant a Board finding in this area."

(Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60), pages 45; 359; and 442)

Again, in Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRB (NS) 1 (CLRB no. 501):

"The mere existence of corporate entities under common control or direction is not enough to attract a declaration under section 133 even if

the activities are associated or related. Those prerequisites must be accompanied with a labour relations purpose before a declaration will be issued. Declarations will only be issued to cure some mischief, real or pending. The purpose of a declaration should correspond with the purposes of the section, i.e., to prevent avoidance of obligations under the Code or to minimize the adverse effect of corporate multiplicity on existing bargaining rights."

(pages 84; and 20)

It cannot therefore be argued a priori that this type of decision should apply automatically when a group of employees different from those to which the discussion applied is involved. Evidence on this point must be adduced each time. For a single undertaking and employer to be found, and to continue to be so found, it must be composed of several subsisting enterprises and employers. In this case the only evidence supporting the merit of applying the previous Board decision lies in the existence of a common human resources department. There would have to be more for us to find that the requirements set out in section 35 have been met and that such a declaration would be appropriate. In this case, in view of the foregoing and the evidence adduced, the Board declares that GTL Transport Inc. (1989) is the employer of the employees involved.

We need now only answer this question: is a unit consisting of dispatchers and dock foremen an appropriate unit at GTL?

First, the Board rejects the employer's objection based on common interests. It is obvious, from the fact that they have the same responsibilities and that they perform the same duties, that they share common interests. Supervisors at the same level quite definitely share common interests. And, as we have seen, in some terminals one person acts as

dispatcher and dock foreman, which fact confirms that the application is well founded in this respect.

The employer's other objection is more serious. In our summary of the facts we have explained the structure of the enterprise and reviewed the events of the autumn of 1988 and during 1989. These facts lead us to find that while a terminal unit would correspond to GTL's basic structural unit it is not appropriate for supervisors in this enterprise. It is uncertain, to say the least, that it would be viable, and creating such a unit would result in undue fragmentation within a single group of employees.

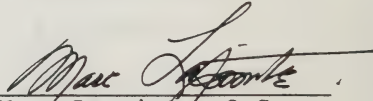
The union's argument that the Board must take into account the low rate of unionization among the employees involved cannot be accepted here. The Board has in certain circumstances issued certificates for units in which dispatchers belong to the same bargaining unit as drivers or office employees. Moreover, at the time the application was filed the applicant represented GTL's drivers and warehouse employees, and therefore had access to all the terminals. Finally, even when this argument does apply it cannot make us completely forget the issue of the unit's viability.

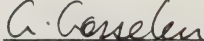
Subsidiarily, the applicant submitted that a unit covering GTL's employees who work in Quebec would be appropriate. Although such a unit would be defensible geographically and in terms of the history of this application, it would however create an artificial division within the enterprise. As we have seen, GTL has adopted an east-west territorial division for its transportation operations. We find that a unit reflecting this organization is appropriate. Not

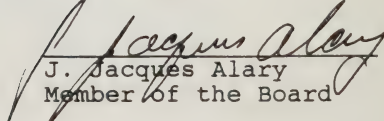
only does it correspond to the structures of the enterprise, but it is also viable. It would include about 40 employees working in more than half the enterprise's terminals, with all those in the eastern region, including the Pointe-Claire terminal.

However, employees performing at the same time dispatching and terminal managing functions are excluded, as are those who act at the same time as dock foreman and terminal manager. In addition, dispatchers at central dispatching, who by virtue of their functions do not belong to any division and could just as well work out of Toronto, Windsor or elsewhere, are also excluded.

The applicant does not have anymore the support of the majority of the employees in the unit determined by this decision. However, at the time the application was filed it had the support of more than 35% of the employees in the eastern region. In accordance with the provisions of section 29(2) of the Code, the Board has ordered that a vote be held in this case.


Marc Lapointe, Q.C.
Panel Chairman


Ginette Gosselin
Member of the Board


J. Jacques Alary
Member of the Board

ISSUED at Ottawa, this 11th day of June 1990

information

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Summary

SEAFARERS' INTERNATIONAL UNION OF
CANADA, APPLICANT, ATLANTIC CONTAINER
EXPRESS INC., ASL ATLANTIC SEAROUTE
LIMITED AND FEDNAV OFFSHORE INC.,
MONTREAL AND HALIFAX, QUEBEC.
RESPONDENTS, THE UNITED STEELWORKERS
OF AMERICA, INTERVENERS.

Board File: 585-230

Decision No.: 804

In this matter, a union representing
a group of seamen working on a vessel
was asking the Board to declare that
a sale of business had occurred
between their employer, owner of the
vessel on board of which they worked
and another undertaking operating in
the business of sea transportation.

The union was therefore requesting
that the collective agreement entered
into between itself and the owner of
the vessel, prior to its sale, bind
the new owner of said vessel.

This case allows the Board to analyse
what constitutes a sale of business
in the sea transportation when such
sale involves only a vessel.

The Board comes to the conclusion that
in the circumstances of this case,
there had not been the sale of a
business under the Code.

Ce document n'est pas officiel. Le
motifs de décision seulement peuvent
être utilisés aux fins légales.

Résumé de Décision

LE SYNDICAT INTERNATIONAL DES MARIN
CANADIENS, REQUERANT, ATLANTIC
CONTAINER EXPRESS INC., ASL ATLANTIC
SEAROUTE LIMITED AND FEDNAV OFFSHORE
INC., MONTREAL AND HALIFAX, QUEBEC
INTIMES, LES METALLURGISTES UNIS
D'AMERIQUE, INTERVENANTS.

Dossier du Conseil: 585-230

Décision n°: 804

Dans cette affaire, il s'agissait
d'une demande d'un syndicat
représentant un groupe de marins
travaillant à bord d'un navire pour
que le Conseil déclare qu'il y avait eu
une vente d'entreprise entre leur
employeur, le propriétaire du navire
sur lequel ils travaillaient, et une
autre entreprise de transport
maritime.

Le syndicat demandait donc que la
convention collective qui le liait
avec le propriétaire du navire avant
sa vente s'applique au nouveau
propriétaire du navire.

La cause permit au Conseil d'analyser
en quoi consiste une vente
d'entreprise dans l'industrie du
transport maritime lorsque ladite
vente se limite à un navire.

Le Conseil en est venu à la conclusion
que dans l'espèce il n'y avait pas eu
de vente d'entreprise au sens du Code



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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Seafarers' International Union of
Canada,

applicant,

and

Atlantic Container Express Inc.,
ASL Atlantic Searoute Limited and
Fednav Offshore Inc., Montreal and
Halifax, Quebec,

respondents,

and

The United Steelworkers of America,

intervenors.

Board File: 585-230

The Board was composed of Members Evelyn Bourassa and
Linda Parsons and of Chairman, Marc Lapointe, Q.C.

The reasons for this decision were written by Chairman
Marc Lapointe.

Appearances:

Joseph R. Nuss and Brian Riordan, for the applicant,

John Coleman, for the respondent ACE,

Gérard Rochon, for the respondent Clarke Transportation
Canada Inc.,

Gino Castiglio for the intervenors.

On March 18, 1988, the Canada Labour Relations Board received an application by The Seafarers International Union of Canada (hereinafter S.I.U.) alleging that a sale of business having occurred between ASL Atlantic Searoute Limited (hereinafter ASL) and Atlantic Container Express Inc., (hereinafter ACE), the provisions of the Code concerning successor rights were applicable to the buyer, ACE.

In its application, the S.I.U. alleged, inter alia, that it had entered into a collective agreement commencing November 1, 1985 to expire October 31, 1988 with Fednav Offshore Inc. covering the unlicensed seafarers at the employ of ASL and wherein the S.I.U. was recognized as the sole and exclusive bargaining agent for said unlicensed personnel working on roll-on roll-off vessels. The ship M.V. Cavallo, it alleged, was one such vessel.

The S.I.U. also alleged that ASL had recently sold or "otherwise disposed of" the Cavallo to ACE. When S.I.U. attempted to have ACE apply its collective agreement, the latter refused.

The Board processed that application and the usual investigation ensued. The investigation revealed other corporate entities involved in the transactions referred to as a sale of business by S.I.U. Fednav Offshore Inc. turned out to be a company used by ASL to manage the boat owned by it: The Cavallo. Said boat was sold by ASL to ACE which contracted out its management to Clarke Transport Canada Inc., after having renamed it the M.V. Cabot.

The S.I.U. argued in the application that the general nature of the business carried on by Fednav Offshore Inc.

(managers for ASL) with respect to the vessel Cavallo, was the transportation by sea from Halifax to Newfoundland of goods which were loaded and unloaded by the roll-on roll-off process and that the general nature of the business carried on by ACE with respect to the vessel now renamed Cabot was identical to that carried on by Fednav Offshore Inc., with one exception : The shipments are from Montreal to Newfoundland, as opposed to being from Halifax to Newfoundland.

It concluded that the sale, transfer and/or disposition of the Cabot (Cavallo) under these circumstances constitutes a sale within the meaning of Section 144 (now Section 44) of the Code (Part V - Industrial Relations - Now Part I - Industrial Relations).

The application and the investigation of the Board regarding it, produced a flurry of reactions. Firstly, counsel intervened on behalf of ACE to oppose said application. Although it was admitted that ACE now owned a vessel formerly called Cavallo which it had renamed Cabot, it alleged that it did not have any employee of its own assigned to it. It was alleged that it had entered into a managing contract with Clarke Transport Canada Inc., (hereinafter Clarke), a third party, whereby the latter operates and manages said vessel; crewing, paying and supervising its own employees aboard said vessel. Counsel concluded that the application having been directed at the wrong legal entity must be rejected.

Secondly, it was alleged that the successor provisions of the Code are not applicable in the circumstances because

ASL goes on operating the same business as it did prior to the sale of the Cabot/Cavallo; transportation of goods between Halifax and Newfoundland with another boat which it had secured, and which uses the same roll-on roll-off technique. The Sanderling. Therefore, no business had been sold.

Thirdly, the two businesses were and are different. ACE, through Clarke, transports goods from Montreal to Newfoundland as opposed to ASL Atlantic Searoute Limited, which, through Fednav, transports goods from Halifax to Newfoundland.

Lastly, counsel for ACE argued on behalf of Clarke, that the employees of the latter were represented by a bargaining agent certified by this Board with which Clarke had entered a collective agreement, namely the United Steelworkers of America (hereinafter, the Steelworkers).

Eventually, the investigation of the Board led to an intervention by the Steelworkers produced in June of 1988, opposing the application of the S.I.U.

It alleged, firstly, that the application is not directed at the right employer, since ACE is not the employer of the employees working on the Cabot/Cavallo.

Secondly, it pointed out that Fednav, on behalf of ASL, goes on operating a ship, the Sanderling, the employees of which are covered by a collective agreement intervened between S.I.U. and Fednav.

Thirdly, it argued that the two businesses are different, one transporting goods from Halifax to Newfoundland and the other, transporting goods from Montreal to Newfoundland. The Cavallo/Cabot used to transport goods from Halifax to Newfoundland when owned by ASL, whereas now, it transports goods from Montreal to Newfoundland whilst owned by ACE.

Fourthly, it alleged that the bare sale of a boat, in the circumstances of this case, cannot constitute the sale of a business under the provisions of the Canada Labour Code.

Fifthly, it confirmed that the Steelworkers have for years entered collective agreements covering both the licensed or unlicensed employees of Clarke Transport Canada Inc., that there are two in existence currently, and, it filed copies thereof.

Sixthly, it alleged that Clarke is indeed the employer of the employees working on the Cabot/Cavallo which has been bought by ACE in order to pursue, through Clarke, the business of transporting goods between Montreal and Newfoundland. In fact, it is a business which is now operating with two ships, because priorly, another ship of the same type as the Cabot/Cavallo and called the Cicero, had been operated in the same business.

Finally, the Steelworkers state that in fact, the business encompassed by the collective agreement intervened between the S.I.U. and the employer (Fednav), signatory to it, operates just as before without any sale or transfer of it. Neither has there been any transfer of employees since

the employer continues to operate said business with the vessel Sanderling. Indeed, the employees who were working on the Cavallo before were now all working on the vessel Sanderling.

And the Steelworkers conclude that, in the circumstances, there is only the sale of a vessel without the transfer or sale of a business or of its goodwill and consequently, there is no nexus or continuity between the business encompassed by the collective agreement entered into by the S.I.U. and the business which is now operated in part with the Cabot/Cavallo.

The final intervention enticed by the investigation of the Board was eventually filed by a specific counsel on behalf of Clarke at the end of June 1988. This enterprise alleges that it is the employer of the employees working aboard the Cabot/Cavallo on the basis of the terms of a managing contract intervened between it and ACE includes the complete responsibility for the recruitment, the hiring, the payment of salaries, the discipline and termination of employment for all employees working aboard that vessel. Clarke confirms that its employees working aboard either the Cabot/Cavallo or the Cicero are covered by a collective agreement entered into with the Steelworkers.

It concluded that the application of the S.I.U. targets the wrong employer and should be rejected.

Furthermore, it goes on to add that, the successor provisions of the Code could not apply in the specific

circumstances of the case, since what transpired does not constitute the sale of a business:

1. ASL did replace the vessel Cavallo by the vessel Sanderling on the same route, both ships using the roll-on roll-off techniques.
2. The whole crew of the Cavallo was hired to work upon the Sanderling under the terms of the collective agreement entered into with the S.I.U.
3. The nature of the business operated by ASL as compared with the business operated by ACE is different not only because of the geographical differences in routing the merchandises transported, but also because of different markets and types of cargoes transported.

Counsel concluded that the application should be dismissed without a hearing, since such a hearing would serve no purpose. The Board after having received a copy of the investigation report by its Labour relations officer, decided otherwise and a public hearing was convened and held in Montreal on September 7, 1988. It heard evidence on the 7th of September, 1988 as well as receiving additional written evidence.

The Board heard the testimony of Mr. R. Robillard, Vice-President Operations at ACE. He testified that the company rented and operated a ship called the Cicero which

sailed regularly from Montreal to St-John's, Newfoundland carrying cargoes emanating 40% from Ontario and 60% from the Province of Quebec. That vessel would then turn around and come back to Montreal with cargoes of containers. The operating of the Cicero became insufficient to fully satisfy the business of ACE and the company began looking around for another vessel to complement the Cicero. It eventually bought the Cavallo/Cabot. The witness administered the buying of the Cavallo. Exhibits were then filed showing the terms of the sale without showing the sums of money. However, the Board satisfied itself that the sale was a true arms length commercial transaction. The witness added that he saw the vessel Cavallo in Halifax in February 1988 where it had been tied up since the middle of that month. It had sailed there in order to undergo a series of repairs and modifications which were part of the sale agreement between ASL and ACE. The most important modifications had to do with the removal of ramps and serious reinforcements of the bridge to make the vessel capable of carrying more containers. The closing for the sale was March 1, 1988. Until the last week of February, there was a skeleton crew aboard that ship and they were not paid by ACE. They were asked to leave the ship and were replaced by a crew supplied by Clarke. A new captain came aboard on March 1st. Finally, the witness stated that clients deal with ACE and pay ACE, but that it is Clarke which pays the crew. The Cavallo, now renamed the Cabot, is a larger ship than the Cicero. During testimony, a copy of the transcript of Register from the Canada Registry of Shipping was filed showing the new name Cabot and the owners, ACE.

A captain, L. Chouinard, employed for many years by Clarke, also testified that since February 1988, he had been appointed captain of the Cabot. He went aboard at Halifax. A number of sailors still aboard the vessel were disembarked on February 28, 1988. A new crew employed by Clarke came aboard and he signed the Ship's articles. He proceeded to hire that crew, a number of whom he knew personally. Captain Chouinard had been captain of the Cicero from 1984 to 1987. He produced a Report of Changes in crew concerning the Cabot, signed by himself. It is a requisite form issued by Transport Canada.

Finally, Mr. R.B. Swallow testified. He is the commercial manager for ASL. He testified that this company owns one vessel, the Sanderling. Until the end of December 1987, the company operated the Cavallo. That vessel was tied up at Dartmouth, N.S. from the end of December to the middle of February and put into Halifax drydock while crewed by an S.I.U. crew, and Fednav paid the crew until February 29, 1988. ASL was looking for a larger vessel for extra capacity. In fact, the Sanderling is 2 1/2 times larger than the Cavallo. The Sanderling first sailed from Halifax to St-John's, the usual route formerly assigned to the Cavallo for the past seven years, on January 8, 1988. The business carried out by ASL consists of maritime cargoes: Mostly automobiles (new) and highway trailers from Halifax to St-John's and on return trips, 1/3 containers and the rest, empty units. He finally testified that all of the members of the former crew of the Cavallo/Cabot were transferred to the Sanderling with the addition of three other seamen.

II

To support its application, S.I.U. argued that both ASL and ACE are in the business of shipping cargoes to Newfoundland by sea. Whether said cargoes come from Montreal, Quebec City or Halifax, the business is the same since they all land in Newfoundland. S.I.U. went on to argue that the main asset of the business of ASL was one vessel and that when that business sold said asset, it sold its business. There was a continuity of the operation of the business by the buyer, ACE. Then the applicant turned to jurisprudence.

III

These reasons for decision have already outlined in Chapter I above, the arguments by counsel for ASL, by counsel for ACE and for Clarke and by counsel for the Steelworkers. They will not be repeated here except for the following comments.

Mostly in the case of counsel for the employers, there was very strong reliance upon a rather recent jurisprudence issuing from this Board in the Secunda Offshore Incorporated case (Board file 585-1140) decision # 589, 67 Di p. 75, a decision dating back to the end of year 1986.

Counsel of record zeroed in on the following excerpts from that case

"There must be more than a transfer of an asset or the takeover of work for a sale of business under the Code to have occurred. The major prerequisites are that the business or part thereof of the seller must be taken over by the purchaser..."

(p. 81) and

"We agree with the S.I.U.'s submission that the link between a seller and a purchaser need not be direct for the purposes of Section 144 (now Section 44) of the Code. If a direct nexus was mandatory to trigger the successor provisions of the Code, it would be a simple matter for parties to a sale of business to undermine the whole purpose of the section. However, that does not assist the union in this case because we are satisfied from the uncontradicted evidence before us, that what is involved here is the transfer of a chattel from a business to another unrelated business and, as we pointed out earlier, it is well established that bargaining rights do not attach to a chattel or an asset such as a piece of equipment, The old adage of "that truck is in our union" has long been dispelled."

(p. 82) (underlining ours)

and drew a rather quick parallel with the instant case.

It happens, for reasons elaborated below, that in this case, there was no sale of business under the provisions of the Code.

But, it could very well happen that the transfer of a sole chattel or sole asset (its sale), could very well trigger the successor provisions in the Code. Bargaining rights could then attach to a chattel or an asset, such as a piece of equipment (here a vessel). In those circumstances, the old adage of "that truck is in our union" would not have been dispelled.

There is a danger for parties to fall into the oversimplification that as long as the sale involved only an asset, there can never be an application of the successor provisions in the Code.

The evidence before the Board, both that part gathered by the investigation of the officer of the Board and that part adduced at the public hearing, did establish that the business of ASL managed by Fednav was carried out mainly by the operating of one vessel, the Cavallo, that it consisted of the transportation of a specific type of cargoes by a specific crew of seamen. The business of ACE managed by Clarke was carried out by a vessel, the Cicero. That business required the addition of another vessel and ACE bought the Cavallo and had it transformed in a dockyard to meet the requisites of its own business of transporting a different type of cargoes. A brand new crew was articulated to man the now CABOT. In the meantime, ASL had acquired a larger vessel to replace the CAVALLO, the Sanderling, upon which it transferred all of the former crew of the CAVALLO and added to it.

It then went on operating the same business as it operated before. Other indicia that the Board looks for

in instances of sales of businesses to decide whether or not there has occurred a sale of business triggering successor rights, were not to be found in the transaction under study.

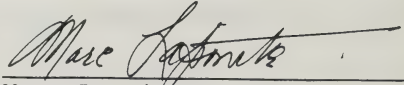
The application is therefore dismissed. But at first glance, this could have constituted a case where a business, as far as assets or chattels are concerned, would possess only one asset, a vessel, and that its sale, together with the accompanying transfer of the rest of the components of the business to a buyer, would trigger the application of the successor provisions in the Code. Then, bargaining rights would attach to a piece of equipment, a vessel.

IV

It might have been relatively easy for the Board to dispose of this case without the necessity for a public hearing if some counsel had cooperated readily with the Board in filing information which the Board felt necessary to have. The Board finally succeeded in ascertaining by proper evidence at a public hearing, the data required to dispose of this application.

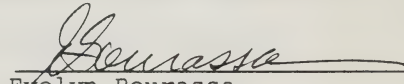
A final note. This case also disclosed in representations addressed to the Canada Labour Relations Board by some counsel, a tone which is intolerable and unacceptable. The Canada Labour Relations Board is a quasi-judicial administrative tribunal specialized in labour relations. But nevertheless a tribunal which must

be addressed respectfully. To deserve respect, parties must be respectful.

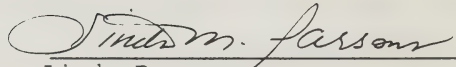


Marc Lapointe, Q.C.
Chairman

Although we concur with the analysis and conclusions of these reasons we wish to disassociate ourselves from the comments made with respect to counsel conduct.



Evelyn Bourassa
Member



Linda Parsons
Member

DATED at Montreal this 31 day of May, 1990.

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Summary

AMALGAMATED TRANSIT UNION, LOCAL
279, COMPLAINANT, AND OTTAWA-
CARLETON REGIONAL TRANSIT
COMMISSION, RESPONDENT EMPLOYER.

Board Files: 745-3593
950-143

Decision No.: 805

Résumé de Décision

LE SYNDICAT UNI DU TRANSPORT,
SECTION LOCALE 279, PLAIGNANT, ET
LA COMMISSION DE TRANSPORT
RÉGIONALE D'OTTAWA-CARLETON,
EMPLOYEUR INTIMÉ.

Dossiers du Conseil: 745-3593
950-143

No de Décision: 805

The Amalgamated Transit Union, Local 279, filed two complaints, one alleging that the Ottawa-Carleton Regional Transit Commission had punished a bus driver, contrary to Part II of the Canada Labour Code (Occupational Safety and Health), for refusing to drive a bus which he considered to be unsafe, and the second alleging that OC Transpo had violated other provisions of Part I of the Code (Industrial Relations) in its treatment of him.

The refusal to drive occurred on November 15, 1989. The complaint was filed on March 26, 1990. Since it had not been filed within the 90 days required under the Code, the complaint was dismissed.

The Board found that all of the issues raised by the employer's alleged unfair treatment of the bus driver already were, or could readily be, the subject of grievances alleging violations of the collective agreement between the parties. The Board therefore decided to apply section 98(3) of the Code and to refuse to hear the second complaint on the ground that it involved matters which could be referred to arbitration.

The Board stated that in future, when complaints of this kind are filed by a union, and they involve parties which are known to have been in a long-standing collective bargaining relationship with each other, the Board will wish to be assured that there are solid grounds for the issues not being determined via arbitration, before any hearing is scheduled.

Le Syndicat uni du transport, section locale 279, a déposé deux plaintes. Dans la première, il allègue que la Commission de transport régionale d'Ottawa-Carleton a puni un chauffeur d'autobus, en violation de la Partie II (Sécurité et santé au travail) du Code canadien du travail, pour avoir refusé de conduire un autobus qu'il jugeait dangereux. Dans la seconde, il allègue que l'employeur a enfreint d'autres dispositions de la Partie I (Relations du travail) du Code par sa façon de traiter le chauffeur en question.

Le chauffeur a opposé son refus le 15 novembre 1989, et la plainte a été déposée le 26 mars 1990. Étant donné que la plainte n'a pas été déposée dans les 90 jours prévus dans le Code, elle a été rejetée.

Le Conseil a jugé que toutes les questions soulevées quant au présumé traitement injuste du chauffeur d'autobus faisaient déjà l'objet de griefs alléguant violation de la convention collective conclue par les parties, ou pourraient facilement en faire l'objet. Par conséquent, il a décidé d'appliquer le paragraphe 98(3) du Code et de refuser d'instruire la seconde plainte parce que celle-ci avait trait à des questions qui pouvaient être envoyées à l'arbitrage.

À l'avenir, lorsque des plaintes de ce genre seront déposées par un syndicat et mettront en cause des parties qui entretiennent depuis longtemps une relation de négociation collective, le Conseil voudra s'assurer, avant de mettre l'affaire au rôle, qu'il y a des motifs valables pour ne pas régler ces questions à l'arbitrage.



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Travail

Reasons for decision

Amalgamated Transit Union,
Local 279,

complainant, and

Ottawa-Carleton Regional
Transit Commission,

respondent employer.

Board Files: 745-3593
950-143

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and François Bastien.

Appearances:

David J. Jewitt, for the Amalgamated Transit Union, Local 279; and

Paul G. Webber and Roger R. Mills, for the Ottawa-Carleton Regional Transit Commission.

These reasons for decision were written by Vice-Chairman Eberlee.

I

The Board convened a hearing in Ottawa on May 31, 1990 into a series of complaints brought by the Amalgamated Transit Union, Local 279 (A.T.U.) against the Ottawa-Carleton Regional Transit Commission (OC Transpo) respecting the latter's treatment of an employee, bus driver André Cornellier.

The complaints were filed with the Board on or about March 26, 1990. In summary they alleged that OC Transpo had:

- violated section 147(a) of the Canada Labour Code (Part II - Occupational Safety and Health) when on November 15,

1989 it placed Mr. Cornellier on paid leave and directed him to undergo a complete medical examination after he had refused to drive a bus which he claimed was unsafe and then eventually switched him to unpaid leave;

- contravened sections 94(1)(a), 94(3)(a), (b) and (e) and section 96 of the Code (Part I - Industrial Relations) in respect of the subsequent handling of Mr. Cornellier's case.

After hearing the submissions of the parties, the Board determined it was unable to entertain the complaint of a violation of section 147(a) because it had not been filed within the time limit specified in the Code. The Board also decided that, since all the other issues before it were already the subject of grievances filed by the union alleging violations of the collective agreement between the parties - or could be made the subject of grievances - it would refuse to hear and determine these matters because it would be more appropriate for them to be dealt with under the grievance and arbitration provisions of that collective agreement. The Board therefore announced at the hearing that it had decided to dismiss the complaints and close the files. These reasons are intended to confirm briefly in writing why the Board took these steps.

II

According to the submissions of the parties, bus driver Cornellier refused on November 15, 1989 to drive a bus with a defective reverse gear because he considered it unsafe. Because of its perception of his alleged previous record, OC Transpo suspected he had a medical problem. After his refusal to drive the bus, Mr. Cornellier booked off sick. However, later on November 15, 1989, he was called to a

meeting with OC Transpo officials. The results of this meeting were that Mr. Cornellier was suspended with pay and directed under section (3) 15.3 of the collection agreement to provide a physician's certificate attesting to his fitness for work. A grievance was filed the next day against OC Transpo's action. The parties' submissions show that the step taken by the employer was viewed, at the time, as being solely a violation of the collective agreement, as having nothing to do with section 147(a) of the Code. Nor did either party invoke any of the other provisions of Part II of the Code respecting the right to refuse.

Soon thereafter, Mr. Cornellier produced a doctor's certificate but OC Transpo was not satisfied that its concerns had been met. The employer then invoked section (3) 15.4 of the collective agreement, which reads as follows:

"(3) 15.4 Where the Commission specifies on reasonable grounds that it continues to be of the opinion that an employee may be medically unfit for work or may jeopardize the safety of others, notwithstanding the delivery of the Certificate, the Commission shall meet with the employee (and his or her Union representative, if the employee so requests) to discuss the work performance of the employee."

A meeting took place on December 1, 1989, which was intended by OC Transpo to be the meeting referred to in section (3) 15.4. The employer handed Mr. Cornellier a letter which required him under section (3) 15.5 of the collective agreement to provide a further medical certificate, to have his physician consult with the OC Transpo physician and to be examined by the OC Transpo physician.

Following this meeting, a dispute blew up over the whole situation and legal counsel became involved. Grievances

were filed against the employer's actions. The union took the position that the December 1 meeting was not a proper section (3) 15.4 meeting and that OC Transpo had no reasonable grounds for invoking section (3) 15.4 and (3) 15.5, not to mention section (3) 15.3. Letters were exchanged, meetings were held, telephone conversations took place and resolutions of the impasse were discussed. Apparently, it was decided to give Mr. Cornellier another opportunity to provide a medical certificate under section (3) 15.3 of the agreement. Late in February and in early March, his physician produced new certificates which reiterated his previous opinion about the bus operator's health, but in somewhat less terse language. OC Transpo continued to be dissatisfied with the adequacy of this medical assessment and demanded that he proceed under section (3) 15.5. Mr. Cornellier's suspension was changed from with pay to without pay on March 7, 1990 after he had still not complied with the Commission's requirement.

Further meetings occurred, with no resolution of the problem. During this period the employer refused to recognize the union's counsel as a "union representative" within the meaning of section (3) 15.4 of the agreement. In its submissions, OC Transpo explained that it attempted to exclude the union's counsel from meetings held under the provisions of the collective agreement because of custom and practice based on a long-standing agreement with the union that the term "union representative" meant a union officer and not a lawyer or some other third party.

The employer takes the position that Mr. Cornellier was suspended without pay as of March 7, 1990, and remains so suspended, because he had refused to provide an adequate certificate under (3) 15.3 of the agreement and has refused to comply with a request to implement (3) 15.5. According

to OC Transpo, "More fundamentally, he is suspended because, in the opinion of the Commission, he has not demonstrated that he is able to safely operate a passenger vehicle."

As has been indicated, the position of Mr. Cornellier and of the union is that the employer has breached the collective agreement in a variety of ways. Thus, grievances have been filed relating to most, if not all, of the issues over which they differ. At the same time, however, the union views the various steps taken by the employer as the dispute has unfolded as constituting the series of violations of the sections of the Code which have been cited earlier.

III

We shall deal first with the question of the timeliness of the section 147(a) complaint. The section reads as follows:

"147.(a) No employer shall dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

But, under section 133(2) a complaint that an employer has violated section 147(a) must be made to the Board "not

later than ninety days from the date on which the complainant knew or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

The question for the Board to determine is when did the complainant know or in the opinion of the Board when ought it to have known of the action or circumstances giving rise to the complaint.

The events which triggered the complaint began at least as early as November 15, 1989, when Mr. Cornellier refused to work. Neither Mr. Cornellier nor the union perceived what the employer did at that time as a breach of section 147(a). Indeed they took it as a violation of the collective agreement and filed a grievance which is still pending and capable of being arbitrated. No complaint under section 147(a) of the Code was filed within 90 days of November 15, 1989. Nor was any step taken by either party to call in a safety inspector to determine whether the situation was unsafe.

But, was some other event - within 90 days of the filing of the complaint on March 26, 1990 - an "action or circumstance" giving rise to the complaint? Was the alteration in Mr. Cornellier's suspension status on March 7, 1990 an action or circumstance giving rise to a timely complaint under section 147(a) when such a complaint was filed on March 26, 1990? The union would have us answer, "yes".

The submissions of the parties show that heavy infighting developed between the parties, not over the events of November 15, 1989 per se but over the employer's later attempts to invoke section (3) 15.5 of the collective

agreement, culminating in the change in Mr. Cornellier's suspension status. The issue or issues between the parties became more and more remotely connected, both in time and in substance to what initiated the whole affair - the events of November 15, 1989.

In another set of circumstances - for example, where an employee refused unsafe work and matters were immediately settled, but it was shown that the employer had simply been patient and six months or a year later had in fact punished the employee for the earlier refusal by firing him or her - the Board might find that the action or circumstances arose, not at the point of the refusal, but at the point of the firing and that a complaint filed within 90 days of the latter event was timely. Here, the submissions of the parties do not convince us that we have a set of circumstances in any way akin to the foregoing.

In the Board's opinion, regardless of later events - which we see as flowing from the battle over the employer's stated concern about Mr. Cornellier's fitness to drive, and its efforts to invoke the collection agreement, and not over Mr. Cornellier's refusal to work on November 15, 1989 - the point from which the 90 days should be counted is November 15, 1989 and therefore the complaint is untimely.

IV

The union wants the Board to determine that the employer's attempt to exclude the union's legal counsel from the meeting contemplated in section (3) 15.4 of the collective agreement, where an employee may be accompanied by the "union representative" of his choice, is a violation of section 94(1)(a) of the Code. This section says:

"94.(1)(a) No employer or person acting on behalf of an employer shall participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ..."

In the Board's opinion, this is basically a question of the interpretation of the collective agreement, which is primarily the realm of the arbitrator or arbitration board provided for in the collective agreement. There is no significant public policy question to be answered which might justify the Board's involving itself in the issue. Indeed, common sense, not to mention sound industrial relations principles, suggests that the Board ought to apply section 98(3) of the Code in respect of this aspect of the complaint because it would be more appropriate for the issues to be dealt with at arbitration. Section 98(3) reads as follows:

"98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

The same reasoning applies to the remaining aspects of the complaint. The union wants the Board to find that OC Transpo's treatment of Mr. Cornellier constitutes violations of sections 94(3)(a), (b) and (e) and section 96. These sections read as follows:

"94.(3)(a) No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay

the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;

(e) seek, by intimidation, threat of dismissal or any kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of trade union."

The union has already filed grievances with respect to all of the issues that have arisen in connection with OC Transpo's treatment of Mr. Cornellier. At the hearing, the Board pointed out that arbitration would probably offer a broader scope for determination of the justice or injustice of this treatment than would a proceeding before the Board. In the case of the suspension, for example, an arbitrator would be able to decide whether or not it was inappropriate on very broad grounds; the Board on the other hand would be able to conclude that it was inappropriate

only if the quorum could identify "anti-union animus" as being one of the factors motivating the employer to impose the suspension. It was also pointed out at the hearing that "anti-union animus" is not something which is readily identifiable in cases of this kind; employer action with which a union disagrees can rarely be classified as flowing from "anti-union animus", particularly where the collective bargaining relationship between the parties is of long standing. It may, however, be a violation of the collective agreement. Thus it will be capable of being rectified through the grievance process and arbitration. Practical considerations ought to persuade a union that resort to arbitration is preferable to a proceeding before the Board under such circumstances - where the matter "could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board", to use the terminology of section 98(3).

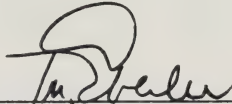
The Board is satisfied that the complaint alleging violations of section 94(3)(a), (b) and (e) and section 96 could be referred to arbitration and should not be dealt with by the Board. The complaint is therefore dismissed.

Finally, this quorum believes it should state its complete agreement with the opinions expressed by another panel of the Board in reasons for decision written over one year ago on the same general issue in Canadian Union of Postal Workers and Canada Post Corporation, (1989), as yet unreported CLRB decision no. 729. At page 5, that panel said:

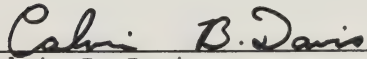
"... We think perhaps the time has come for the Board to take another look at its practice vis à vis section 98(3) and lean towards giving more priority to the private dispute resolution mechanisms that are mandatory

in each collective agreement under the Code. Particularly where there has been a longstanding relationship between the parties, where the dispute arises from their day-to-day operations and where there are no important matters of public policy under the Code at stake."

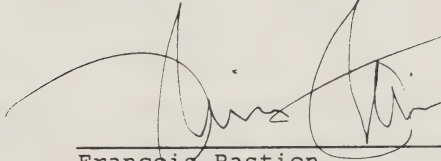
In future, when complaints of this kind are filed by a union, and they involve parties which are known to have been in a long-standing collective bargaining relationship with each other, the Board will wish to be assured that there are solid grounds for the issues not being determined via arbitration, before any Board hearing is scheduled.



Thomas M. Eberlee
Vice-Chairman

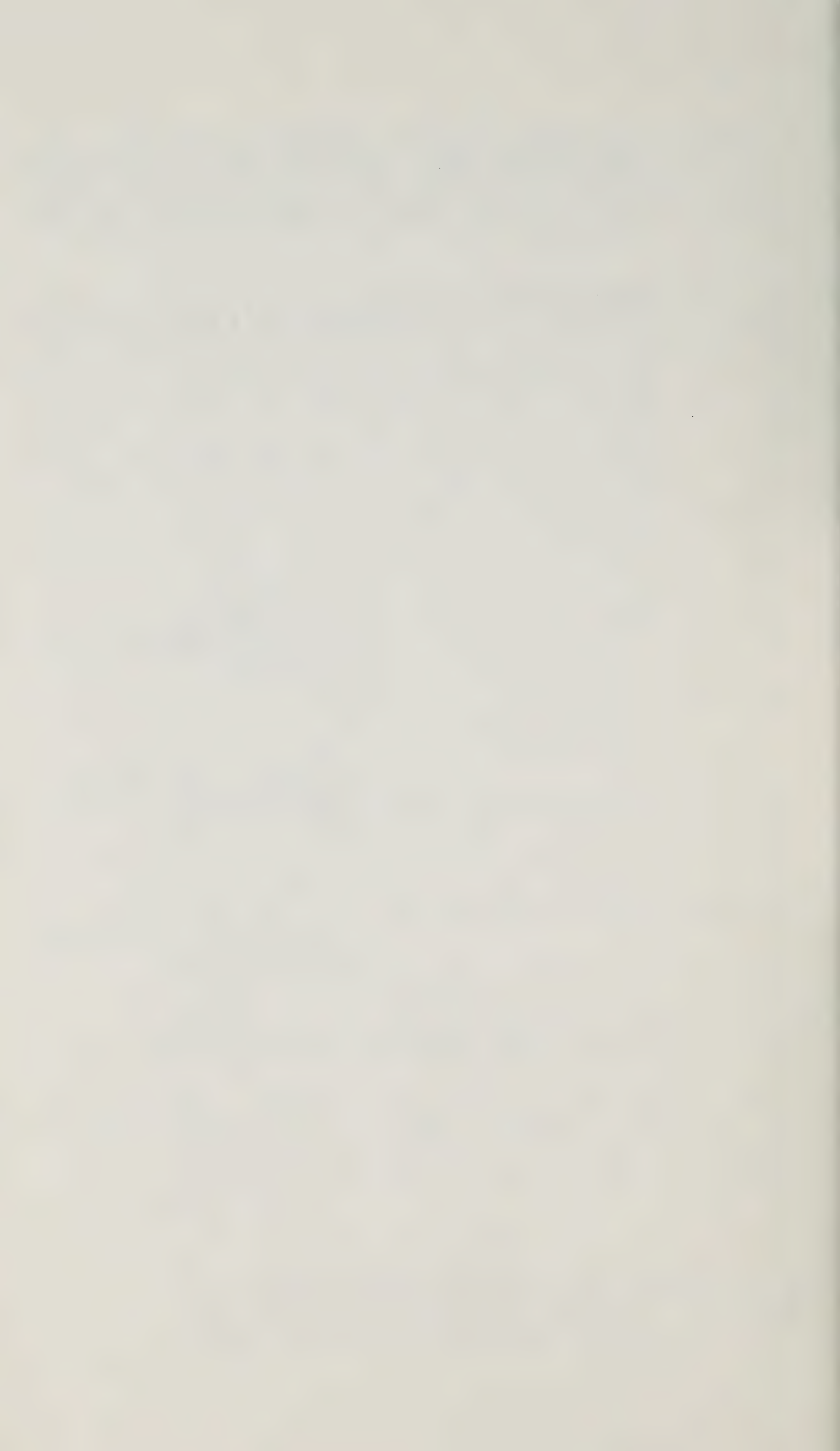


Calvin B. Davis
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 26th day of June 1990.



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Summary

VALERIE HERTZ, LYNN JOHNSTON, AND
NORMA THOMPSON, COMPLAINANTS, NATIONAL
AUTOMOBILE, AEROSPACE AND AGRICULTURAL
WORKERS UNION OF CANADA (CAW-CANADA),
RESPONDENT, AND AIR CANADA, EMPLOYER.

Board File: 745-3487

Decision No.: 806

These reasons deal with a complaint
under the duty of fair representation
provisions of the Canada Labour Code
(Part I - Industrial Relations).

The complainants alleged that the
CAW-Canada had violated section 37 of
the Code by giving them wrong advice
about their seniority rights under the
relevant collective agreement.
Relying upon this advice the
complainants transferred from full-
time to part-time employee status as
customer service agents for Air Canada
at its Saskatoon base. All three
complainants later lost their jobs
when Air Canada downsized its
workforce at the Saskatoon base.

Notwithstanding the serious adverse
effects on the complainants, the Board
found that the union had not violated
section 37 of the Code. The Board was
satisfied that the union officials
involved had not acted with any
unlawful motives and had given the
advice in good faith. The Board found
that the language of the collective
agreement could stand the
interpretation given by the union
officials and that being wrong in
itself is not necessarily a breach of
a union's duty of fair representation.
The Board also reconfirmed its non-
interventionist role while supervising
the duty of fair representation of
bargaining agents in the federal
jurisdiction.

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Résumé de Décision

VALERIE HERTZ, LYNN JOHNSTON ET NORMA
THOMPSON, PLAIGNANTES, LE SYNDICAT
NATIONAL DES TRAVAILLEURS ET
TRAVAILLEUSES DE L'AUTOMOBILE, DE
L'AÉROSPATIALE ET DE L'OUTILLAGE
AGRICOLE (TCA-CANADA), INTIMÉ, ET AIR
CANADA, EMPLOYEUR.

Dossier du Conseil: 745-3487

N° de Décision: 806

Les présents motifs portent sur une
plainte de manquement au devoir de
représentation juste prévu par le Code
canadien du travail (Partie I -
Relations du travail).

Les plaignantes allèguent que TCA-
Canada a violé l'article 37 du Code
en leur donnant de mauvais conseils
concernant leurs droits d'ancienneté
en vertu de la convention collective
applicable. Suivant ces conseils, les
plaignantes, des préposées au service
à la clientèle d'Air Canada à
Saskatoon, sont passées d'employées
à plein temps à employées à temps
partiel. Les trois plaignantes ont
par la suite perdu leur emploi
lorsqu'Air Canada a réduit ses
effectifs dans cette ville.

Malgré les conséquences graves de
cette mesure pour les plaignantes, le
Conseil a jugé que le syndicat n'avait
pas violé l'article 37 du Code. Le
Conseil est convaincu que les
dirigeants syndicaux en cause
n'avaient pas agi de façon illégale
et avaient en toute bonne foi prodigué
leurs conseils. Il a en outre jugé
que la convention collective pouvait
être interprétée comme l'avaient fait
les dirigeants et que se tromper ne
constitue pas nécessairement un
manquement au devoir de représentation
juste. Le Conseil a réaffirmé son
rôle non interventionniste lorsqu'il
s'agit de surveiller le comportement
des agents négociateurs en matière de
représentation juste dans la sphère
de compétence fédérale.



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Reasons for decision

Valerie Hertz,
Lynn Johnston, and
Norma Thompson,

complainants,

National Automobile, Aerospace
and Agricultural Workers Union
of Canada (CAW-Canada),

respondent,

and

Air Canada,

employer.

Board File: 745-3487

The Board was composed of Vice-Chairman Hugh R. Jamieson,
and Members Robert Cadieux and Michael Eayrs.

The reasons for this decision were written by Vice-
Chairman Hugh R. Jamieson.

Appearances:

Messrs. A. Robson Garden and Kevin C. Wilson, for the
complainants;

Mr. J. James Nyman, for the CAW-Canada;

No one appeared for Air Canada.

I

On December 13, 1989 the three complainants, Valerie
Hertz, Lynn Johnston and Norma Thompson filed a complaint
with the Board alleging that the National Automobile,
Aerospace and Agricultural Implement Workers Union of
Canada (CAW-Canada) (the union or the CAW) had breached
its duty of fair representation which is contained in
section 37 of the Canada Labour Code (Part I - Industrial
Relations):

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

In addition to naming the union as the respondent the complainants also named the following union representatives:

Ms. Cheryl Kryzaniwsky, President of Local 2213;
Mr. A.L. Pickett, Chairperson, District 204, Local 2213;
Mr. James Biggar, National Representative, CAW; and
Mr. Tom Freeman, Chairperson, Bargaining Committee,
Unit No. 1 (Air Canada)

The complainants said that they had relied upon certain advice from the foregoing union representatives affecting their seniority rights under the relevant collective agreement and had transferred from full-time employees to become part-time employees. The advice and contract interpretation given the three complainants by the union representatives later turned out to be wrong and they lost their jobs.

During the relevant times between March 1986 and October 28, 1989 when the circumstances giving rise to the complaint occurred, the three complainants were employed by Air Canada (the employer) as customer service agents at Saskatoon. They were long-time employees of Air Canada: Lynn Johnston's seniority date is April 15, 1974; Valerie Hertz' is June 2, 1975; and Norma Thompson's is November 7, 1977. As customer service agents they were included in the nationwide bargaining unit represented by the CAW. This bargaining unit consists of over three thousand employees across Canada. The CAW is the successor bargaining agent to the Canadian Air Line Employees' Association (CALEA) which merged with the CAW in July 1985. All of the previously mentioned union representatives held union offices in CALEA prior to the merger

with the CAW. Another union representative, Mr. Gregory Spencer, national representative of the CAW, who played a prominent role in these proceedings, also previously held office with CALEA. Historically, CALEA and Air Canada and now the CAW and Air Canada have had a collective bargaining relationship for over 45 years.

Basically, the facts are not in dispute. Prior to 1984, CALEA's philosophy to part-time employees was negative. It looked upon part-timers as a threat to the job security of its full-time members. The employer's demand for increased use of part-time employees in the 1984-1985 negotiations led to a national strike by CALEA. The end result of the strike which CALEA in effect lost vis-à-vis part-time employees, was that the union was forced to change its approach and, rather than attempting to discourage part-time employment by denying part-timers access to employment benefits such as pension, health and welfare, etc., CALEA attempted and did succeed to some extent to substantially improve the lot of part-time employees. According to the testimony from union witnesses at the hearing into this complaint which was held at Saskatoon on May 23 and 24, 1990, this was to encourage its members to transfer to part-time rather than be laid-off in a fast becoming deregulated industry. It was also designed to entice the employer to use union members as part-timers rather than hiring new employees from outside.

When the strike ended on May 19, 1985, the most relevant change to the terms of the collective agreement for our purposes here, was that for the first time full-time employees and part-time employees were to be included on the same seniority list. Also, the date of May 19, 1985 became a very important date for seniority purposes. As the quid pro quo for increased access to part-time employees, Air Canada agreed that no full-time employee in the bargaining unit as of that date could be replaced by a part-time employee.

II

Against that background, in 1986 complainant Lynn Johnston decided for personal family reasons that it would be beneficial for her to transfer from full-time employment to part-time. It was well known at that time that the employer intended to downsize its operations at Saskatoon so Mrs. Johnston approached her local union representative, Mr. A.L. Pickett, to clarify her situation if she was a part-timer when the inevitable lay-offs came. Generally speaking, what occurred was that Lynn Johnston approached Mr. Pickett who informed her that he did not think that she would be able to exercise her full-time seniority rights as a part-timer but, as he was not certain of the proper interpretation of the new provisions in the collective agreement, he said that he would discuss the matter with Mr. Tom Freeman. Mr. Freeman was initially of the opinion that part-timers would not be able to bump full-timers but after a reading of the new provisions he concluded that Mrs. Johnston, who was a full-time employee as of May 19, 1985, would have senior recall rights according to her original seniority date. This was later discussed with Mr. Jim Biggar, who confirmed that in the situation explained to him by Mr. Freeman, the part-time employee who had the date of May 19, 1985 as a full-time employee, would be able to bump back into the unit as full-time. Relying upon that advice, Lynn Johnston became a part-time employee.

There was some confusion between the testimony of Mrs. Johnston and the union's evidence as to when certain incidents took place, however, we need not resolve these differences as the union conceded that all three complainants transferred to part-time status after having been informed by the union that they would be able to bump less senior full-time employees and thus retain their jobs.

Some time later in 1986, Norma Thompson followed Lynn Johnston's lead. Returning to work after maternity leave, Ms. Thompson decided that part-time employment might be a temporary solution to some child care problems. After speaking with Lynn Johnston about what the union had told her and attending a union meeting in October 1986, where she was assured by Mr. Tom Freeman that she would be able to bump back into a full-time position, Norma Thompson opted for part-time work.

Valerie Hertz' story was the same. Returning from maternity leave, part-time employment was more appealing to her on a temporary basis. After speaking to the other two complainants she sought advice from the union representative at Saskatoon, Mr. Pickett. According to Ms. Hertz, Mr. Pickett told her that in the event of lay-offs there was no way she could lose her job. She converted to part-time employment effective May 1, 1987.

In July 1989, Air Canada decided to implement its plans to reduce its customer service staff at Saskatoon, Regina and Ottawa. Upon receiving the notification, Mr. Tom Freeman, in his capacity of bargaining committee chairperson, visited the three affected bases. He went into Saskatoon during the week of July 16. At that time he was still of the belief that the complainants could bump back into full-time jobs depending on their original seniority dates; therefore, there was no controversy at that point. Mr. Freeman went to Regina, met with the employees there and then moved on to Ottawa. It was at Ottawa that doubts began to form in his mind. After being questioned by the 23 or 24 part-timers at Ottawa to whom he expressed his views on the right of a part-timer to bump a full-time employee, he was severely challenged by the full-time employees at that base. They interpreted the agreement to mean that no part-time employee could bump a full-time employee who had the May 19, 1985 date under any circumstances.

Feeling pretty sick about the fate of the Saskatoon employees if it turned out that the Ottawa contingent of full-time employees were correct, Mr. Freeman travelled to Toronto and spoke with Mr. Jim Biggar. As it turned out, Mr. Biggar had already received a phone call from Ottawa so he was aware of the controversy. This was July 25, 1989. The next day, July 26, at a meeting in Montreal with management to discuss severance packages, the issue of seniority rights arose. Air Canada immediately took the position that part-time employees could not bump full-time employees who had the date of May 19, 1985.

Mr. Biggar and Mr. Freeman did not agree with this interpretation of the collective agreement and, as the bargaining committee already had a meeting scheduled for August 2, 1989, it was decided to put the question of bumping rights on the agenda. Mr. Greg Spencer was at this meeting. He had been spokesperson for CALEA during the 1984-1985 negotiations and he did not share Mr. Biggar's view that part-timers could bump full-timers who had the date. In fact, Mr. Spencer agreed with the employer's views of the intent of the relevant provisions of the collective agreement. Following a discussion involving all present, a vote was taken and Mr. Spencer's opinion prevailed. It was decided that the proper interpretation was that no part-timer could bump a full-timer who was employed as full-time as of the date of May 19, 1985. As all full-time employees at Saskatoon had the date, this meant that the complainants, who were part-timers when the lay-offs were called, could not bump back into the unit as full-time.

The end result was that the complainants had to be informed that the earlier opinion expressed to them was not correct and, considering that the union now agreed with the employer's interpretation of the collective agreement, no grievances would

be taken on their behalf. The three complainants were eventually laid off effective October 28, 1989 and, while they have recall rights under the collective agreement, the chances of recall are practically non-existent.

III

Counsel for the complainants argued that the conduct of the CAW officers who were responsible for giving the complainants wrong advice can only be described as arbitrary and thus a breach of the union's duty of fair representation. Considering the critical job interests which were at stake here, counsel submitted that before Messrs. Freeman and Biggar took any position on the question of seniority and bumping rights they should have sought the opinions of the bargaining committee which has the ongoing responsibility for the administration of the collective agreement, or at least they should have discussed the matter with Mr. Spencer who had been CALEA's chief spokesperson at the time when the relevant provisions of the collective agreement were agreed to in 1985. To make such a crucial decision on the basis of one telephone call constituted gross negligence on Mr. Biggar's part according to the complainants.

The union, on the other hand, argued that even if the advice given to the complainants later turned out to be wrong, the union officers had acted in good faith and that they had not contravened section 37 of the Code. Counsel for the CAW cautioned the Board about the negative impact on the free collective bargaining system should the Board interfere with the union's representational rights to the extent asked for by the complainants. Counsel pointed out that there is no guarantee of correctness when trade union officers advise members of their rights under a collective agreement. Provided that decisions are taken in good faith, counsel submitted that the Board ought not

to second guess union officers or impose a "correctness" test which could seriously inhibit the day-to-day decision making role of union officers, particularly when they are faced with difficult choices in the grievance-arbitration processes.

We agree with the fundamental basis of the argument by counsel for the union that this Board should not be second-guessing decisions taken by union officials even if we may feel that the decisions were wrong or, like here, where the decision later turns out to be wrong. The Board has said often that we do not sit in appeal from decisions of union officials when dealing with section 37 complaints. Nor should the Board be swayed by the results or the impact of seemingly wrongful tactics or decisions by trade unions even if it means that persons such as the complainants in this case have been seriously adversely affected by such decisions. The Board must take itself beyond these often tempting and persuasive influences and look neutrally at the manner in which the decision was made. Absent unlawful motives, or seriously negligent conduct, the Board should resist the temptation to interfere.

The Board must also keep in mind the role that it has adopted for itself vis-à-vis the duty of fair representation. This role was set out by the Board sitting in plenary session in Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304):

"Let us commence with some basic premises we recognize. First, the duty of fair representation is not a collection of per se rules. If it were Parliament would have enacted the rules. Clear rules have their administrative advantages but they often bear harsh costs - like a rule to arbitrate all dismissals. Second, union officers, who are frequently selected by ballot or apathy, are not necessarily trained, informed or skilled in representation. Union members get the leadership they select or neglect to actively select. The leaders are not analogous to lawyers paid to service clients but more like legislators selected to service a constituency. They will make errors and mistakes through ignorance, lack of training or experience, or lack of resources."

Third, the union is not a service enterprise run for a profit or only for representational purposes. It often acts as a focus for employee social activity. Its interests on behalf of employees extend into non-collective bargaining goals and interests. It may participate in workers' compensation regulation, unemployment insurance administration, apprenticeship programs, trade or professional standard setting, economic planning with government, industrial recovery for ailing sectors of the economy, and many other direct employee related activities. Unions also share and work toward wider social goals befitting their participation in a democratic society. All of this is directed to fulfill the human drive toward social self-advancement. Working at these tasks are unions with narrow interests and wide interests, plentiful and scarce resources, effective and inept leadership, business and social priorities, and active and apathetic memberships. The employees select their union and its leadership and they can reshape or reject it.

It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies."

(pages 323-324; 131; and 14,830-14,831; emphasis added)

While the writer dissented in part in the foregoing Brenda Haley, supra, decision, the Board was unanimous when it adopted a non-interventionist role in the supervision of the duty of fair representation of bargaining agents in the federal jurisdiction. This panel of the Board agrees with those policies of the Board.

Particularly relevant to the instant case before us, the Board went on to say in Brenda Haley, supra:

"But the law does not condone all good faith action. Some action or inaction is such a total abdication of responsibility it is no longer mere incompetence - it is a total failure to represent (e.g. Forestell and Hall, supra). Some conduct is so arbitrary or seriously (or grossly) negligent it cannot be viewed as fair. This is especially so when a critical job interest of an individual is at stake."

(pages 324-325; 131-132; and 14,831; emphasis added)

It was these latter comments of the Board upon which counsel for the complainants relied heavily when describing the conduct of Mr. Biggar as arbitrary or grossly negligent. At no time, however, did the complainants suggest that the decisions of Mr. Freeman or Mr. Biggar were made in bad faith, or with any malice or hostility towards the complainants, or in a discriminatory manner or for any other such improper motive. If such allegations had been made, we are satisfied that the facts and circumstances before us would not support such a finding. What we have to decide, therefore, is whether the decisions taken by Messrs. Freeman and Biggar fall into the arbitrary classification to the extent that they can be considered to constitute gross negligence.

In this context, arbitrary decisions have been described as being conclusions which are not based on any general rule, policy or rationale or, which have been arrived at on a whim or based on one's own preferences with little regard for the facts. Considering the evidence before us and taking into account the credibility and sincerity of Mr. Freeman and Mr. Biggar who both testified at the hearing, it would be difficult to assign any of the foregoing connotations of arbitrariness to their involvement in this case.

Certainly, if one approaches the actions of each union representative singularly and isolates Mr. Biggar as did counsel for the complainants, it might be taken that Mr. Biggar could have taken more time to reach the conclusion he did when approached by Mr. Freeman. However, just because a conclusion is arrived at swiftly does not mean that it is arbitrary. Rather than analyzing the action of each union officer separately, we are of the opinion that this situation calls for an overview of how the union representatives responded to the issue collectively. When viewed in this light, it can be seen that this was not a situation where a union official made an uninformed decision without due care and attention to all of the options. Three levels of union representatives were involved before an answer was given to the complainants; Mr. Pickett at the Local level, Mr. Freeman at the Regional level, and Mr. Biggar at the National level. Both Mr. Pickett and Mr. Freeman turned their minds to the matter at issue and, notwithstanding their preliminary negative instincts, they sought alternative interpretations and advice in light of the unusual circumstances where Mrs. Johnston, who was the first to enquire about her bumping rights, was a full-time, long-service employee who had the crucial seniority date of May 19, 1985.

Mr. Freeman, seeing a possibility of an alternative interpretation under the new provisions of the collective agreement now that part-time employees were included in the same seniority list with full-time employees, put the proposition to Mr. Biggar for his opinion. Mr. Biggar agreed with Mr. Freeman within the framework of the situation outlined to him by Mr. Freeman. Perhaps Mr. Freeman oversimplified the issue so that Mr. Biggar did not see the larger problem, however, regardless of that, both of them reached an interpretation of the relevant provisions of the collective agreement which in our opinion the language of the

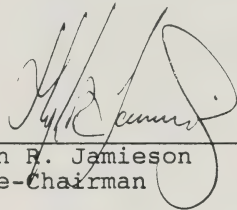
agreement could stand. It was not an unreasonable position to take. As a matter of fact, counsel for the complainants later urged the CAW to use the very same interpretation while atte. convince the union to proceed with a grievance on the complainants' behalf.

Mr. Biggar testified that he felt at ease making his decision. This is his job, he makes twenty or thirty such decisions every week, it is what he is paid to do and, his primary responsibility is to administer the Air Canada collective agreement. With his knowledge and experience he saw no need to seek advice from elsewhere. Taking into account the fact that Mr. Biggar was a party to the CALEA negotiations during latter stages of the strike in 1985 when the relevant provisions of the collective agreement were agreed to, this Board cannot fault Mr. Biggar for doing what he did in the circumstances. We certainly cannot find that he violated section 37 of the Code, even if it turned out later that the advice he gave was wrong and that the complainants were adversely affected by it. Nor can we find that Messrs. Freeman and Pickett, who carried the wrong advice to the complainants, violated the Code in these circumstances.

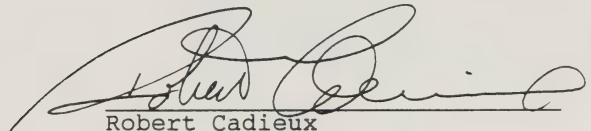
Trade unions often have to make difficult decisions when it comes to seniority, the effect of which may mean lay-off for one group of employees as opposed to another. If Mr. Biggar's interpretation of the collective agreement provisions had been adopted by the bargaining committee on August 2, 1989 rather than Mr. Spencer's, there would in all likelihood have been another group of complainants before the Board. When it comes to seniority and lay-offs, there are always casualties. In the unique circumstances of this case the complainants are the casualties and it is indeed unfortunate that their destiny was decided by wrongful advice from their bargaining agent.

Taking all of the circumstances into account however, the Board cannot find that the actions of the union and its representatives violated section 37 of the Code.

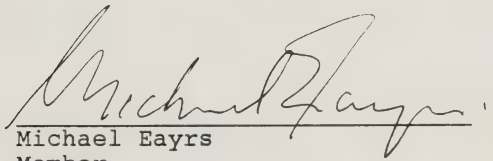
The complaints are dismissed accordingly.



Hugh R. Jamieson
Vice-Chairman



Robert Cadieux
Member



Michael Eayrs
Member

DATED at Ottawa this 25th day of June, 1990.

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Convention
Publication

ERRATA

July 11, 1990

le 11 juillet 1990

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Veuillez noter qu'en photocopiant le Motifs de décision n° 806, il y a eu erreur d'impression aux pages 7 et 12. Vous trouverez ci-jointes les pages modifiées.

We are sorry for any inconvenience this may have caused you.

Nous nous excusons pour tout ennui que cela a pu vous causer et nous vous prions d'agréer, Monsieur/Madame, l'expression de nos sentiments les meilleurs.

Sincerely,

Diane Lyr

*for /
pour /* J. Paulin
Publications Officer/
Agente des publications

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III

Counsel for the complainants argued that the conduct of the CAW officers who were responsible for giving the complainants wrong advice can only be described as arbitrary and thus a breach of the union's duty of fair representation. Considering the critical job interests which were at stake here, counsel submitted that before Messrs. Freeman and Biggar took any position on the question of seniority and bumping rights they should have sought the opinions of the bargaining committee which has the ongoing responsibility for the administration of the collective agreement, or at least they should have discussed the matter with Mr. Spencer who had been CALEA's chief spokesperson at the time when the relevant provisions of the collective agreement were agreed to in 1985. To make such a crucial decision on the basis of one telephone call constituted gross negligence on Mr. Biggar's part according to the complainants.

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We agree with the fundamental basis of the argument by counsel for the union that this Board should not be second-guessing decisions taken by union officials even if we may feel that the decisions were wrong or, like here, where the decision later turns out to be wrong. The Board has said often that we do not sit in appeal from decisions of union officials when dealing with section 37 complaints. Nor should the Board be swayed by the results or the impact of seemingly wrongful tactics or decisions by trade unions even if it means that persons such as the complainants in this case have been seriously adversely affected by such decisions. The Board must take itself beyond these often tempting and persuasive influences and look neutrally at the manner in which the decision was made. Absent unlawful motives, or seriously negligent conduct, the Board should resist the temptation to interfere.

The Board must also keep in mind the role that it has adopted for itself vis-à-vis the duty of fair representation. This role was set out by the Board sitting in plenary session in Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304):

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agreement could stand. It was not an unreasonable position to take. As a matter of fact, counsel for the complainants later urged the CAW to use the very same interpretation while attempting to convince the union to proceed with a grievance on the complainants' behalf.

Mr. Biggar testified that he felt at ease making his decision. This is his job, he makes twenty or thirty such decisions every week, it is what he is paid to do and, his primary responsibility is to administer the Air Canada collective agreement. With his knowledge and experience he saw no need to seek advice from elsewhere. Taking into account the fact that Mr. Biggar was a party to the CALEA negotiations during latter stages of the strike in 1985 when the relevant provisions of the collective agreement were agreed to, this Board cannot fault Mr. Biggar for doing what he did in the circumstances. We certainly cannot find that he violated section 37 of the Code, even if it turned out later that the advice he gave was wrong and that the complainants were adversely affected by it. Nor can we find that Messrs. Freeman and Pickett, who carried the wrong advice to the complainants, violated the Code in these circumstances.

Trade unions often have to make difficult decisions when it comes to seniority, the effect of which may mean lay-off for one group of employees as opposed to another. If Mr. Biggar's interpretation of the collective agreement provisions had been adopted by the bargaining committee on August 2, 1989 rather than Mr. Spencer's, there would in all likelihood have been another group of complainants before the Board. When it comes to seniority and lay-offs, there are always casualties. In the unique circumstances of this case the complainants are the casualties and it is indeed unfortunate that their destiny was decided by wrongful advice from their bargaining agent.

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Summary

MEDHAT SHEHATA, COMPLAINANT, CANADIAN
UNION OF POSTAL WORKERS, BARGAINING
AGENT/RESPONDENT, AND CANADA POST
CORPORATION, EMPLOYER.

Board File: 745-3408

Decision No.: 807

Résumé de Décision

MEDHAT SHEHATA, PLAIGNANT, LE SYNDICAT
DES POSTIERS DU CANADA, AGENT
NÉGOCIATEUR/INTIMÉ, ET LA SOCIÉTÉ
CANADIENNE DES POSTES, EMPLOYEUR.

Dossier du Conseil: 745-3408

N° de Décision: 807

These reasons deal with a complaint
alleging a breach of the union's duty
of fair representation contained in
section 37 of the Code.

The grounds for the complaint were
that CUPW failed to file a grievance
concerning the complainant's discharge
from his employment at Canada Post.
While the complaint is against CUPW,
the circumstances giving rise to the
complaint occurred immediately after
CUPW took over the bargaining rights
of the Letter Carriers Union of Canada
(the LCUC). The union officers
involved were LCUC officers.

The complaint was allowed. The case
turned completely on an issue of
credibility between the testimony of
the complainant and the chief steward
of the LCUC. The Board accepted the
testimony of the complainant.

The Board took the remedial steps of
waiving the time limits in the
collective agreement and ordered CUPW
to file a grievance on behalf of the
complainant and to take said grievance
to arbitration if necessary. CUPW is
to be responsible for any compensation
awarded to the complainant from the
date of discharge to the date the
grievance is filed. Canada Post will
be liable for any compensation awarded
after that date.

Les présents motifs portent sur une
plainte alléguant manquement au devoir
de représentation juste prévu à
l'article 37 du Code.

La plainte est fondée sur le fait que
le SPC n'a pas déposé de grief au
sujet du congédiement du plaignant par
la Société canadienne des postes.
Même si la plainte a été déposée
contre le SPC, les circonstances
donnant lieu à la plainte se sont
produites immédiatement après le
transfert des droits de négociation
de l'Union des facteurs du Canada
(l'UFC) au SPC. Les dirigeants
syndicaux concernés étaient des
dirigeants de l'UFC.

La plainte est accueillie. L'affaire
s'est déroulée complètement autour
d'une question de crédibilité entre
le témoignage du plaignant et celui
du délégué syndical de l'UFC. Le
Conseil a accepté le témoignage du
plaignant.

À titre de redressements, le Conseil
a déclaré les délais de la convention
collective nuls et a ordonné au SPC
de déposer un grief au nom du
plaignant et de porter ledit grief à
l'arbitrage s'il y avait lieu. Le SPC
devra verser toute indemnité attribuée
au plaignant depuis la date de son
congétiement jusqu'à la date du dépôt
du grief. Postes Canada devra verser
toute indemnité attribuée après cette
date.



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Reasons for Decision

Medhat Shehata,
complainant;

Canadian Union of Postal
Workers,
bargaining agent/respondent;

Canada Post Corporation,
employer.

Board File: 745-3408

The Board was composed of Vice-Chairman Hugh R. Jamieson and Members Linda M. Parsons and Evelyn Bourassa.

The reasons for this decision were written by Vice-Chairman Hugh R. Jamieson.

Appearances:

Medhat Shehata for himself;

Mr. Paul Cavalluzzo and Ms. Leanne MacMillan, for the Canadian Union of Postal Workers; and

Mr. Chris Wartman, for Canada Post Corporation.

I

This complaint by Mr. Medhat Shehata (the complainant) alleging that the Canadian Union of Postal Workers (CUPW or the union) had breached its duty of fair representation which is contained in section 37 of the Canada Labour Code (Part I - Industrial Relations) was filed with the Board on October 27, 1989. Section 37 of the Code provides:

"A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The grounds for the complaint were that CUPW had either lost or had simply failed to process a grievance on behalf of the complainant after he had been fired from his letter carrier job at Canada Post Corporation (CPC or the employer), on or about February 23, 1989. The union denied the allegations claiming that the complainant had failed to provide facts to the union upon which it could file a grievance. The union also raised the question of the timeliness of the complaint under section 97(2) of the Code.

This complaint was complicated by the fact that the complainant's discharge occurred shortly after CUPW had been certified by the Board to take over the bargaining rights of the Letter Carriers Union of Canada (the LCUC). This had occurred on or about February 1, 1989. CUPW of course inherited the LCUC collective agreement and there was quite some turmoil for a while during the transitional period. LCUC officers were still in place, now making decisions on grievances on behalf of CUPW. There was also a lot of frustration on the part of the LCUC members and LCUC union officers over having lost their union's bargaining rights. It was within this unsettled period that the complainant attempted to file his grievance over his discharge.

This matter was heard by the Board at Toronto on June 19, 1990.

II

The complainant was hired by CPC on February 3, 1988 as a call casual letter carrier. On or about October 1, 1988 the complainant signed what is termed a "Term Employment Contract" under which his employment conditions were governed by the provisions of the LCUC collective agreement. During the

investigation of this complaint and also at the hearing there was doubt cast as to the complainant's employment status at the time he was discharged, i.e., was he a call casual whereby he would not have access to the grievance procedure in the LCUC agreement or, was he a term contract employee which would bring him within the scope of the LCUC grievance process? At the hearing the parties agreed that for the purposes of this complaint Mr. Shehata would be considered to be a Term Contract Employee therefore, the Board did not have to resolve this issue.

This case turns on the credibility of two key witnesses who testified before the Board. The complainant and Mr. Ron O'Sullivan who was the LCUC chief steward at the time. Their evidence on crucial facts was in absolute conflict. Briefly, the two opposing stories were as follows:

The complainant was fired from his employment at CPC on February 23, 1989. This was confirmed by a letter of discharge dated February 22, 1989 from Mr. A.M. Leeder, Zone Manager, CPC, which read:

"89-02-22

Mr. M. Shehata
Term Letter Carrier
Woodbridge

Dear Mr. Shehata:

This is to advise you I have decided to terminate your employment with Canada Post Corporation, effective end of shift on February 23, 1989.

Reason for this action is your unacceptable job performance.

On December 23, 1988, an interview was held with you regarding your poor job performance when you failed to deliver all mail in a reasonable period of time and failed to deliver your registers.

On January 13, 1989, an interview was held with you regarding your unsatisfactory job performance where you left mail in a relay box overnight.

Finally on February 21, 1989, another interview was held with you regarding your unsatisfactory job

performance when you mishandled priority post and householder items.

Your job performance is still unacceptable to me and I can no longer accept this type of performance.

Your Pay & Benefits section will be notified to process any monies owing to you as soon as possible.

You are expected to return to Canada Post Corporation any equipment or keys in your possession."

Shortly thereafter the complainant contacted the chief steward Mr. Ron O'Sullivan about his termination. Mr. O'Sullivan informed him that there was a 1st step grievance meeting the following Tuesday and that he would raise the issue with Mr. Leeder of CPC at that time.

Mr. Shehata was somewhat confused about what happened at that meeting; he recalled being there at the actual meeting with O'Sullivan and Leeder, however, the evidence from both Mr. O'Sullivan and the Vice-President of the LCUC Local 190 Mr. James Lawrence showed that the complainant was not actually at the meeting but that he had met with Mr. Lawrence and with Mr. O'Sullivan at the location of the meeting but had not met with Mr. Leeder.

In any event, the response from Mr. Leeder was negative, he was not about to reinstate the complainant so, according to the testimony of Mr. Lawrence, he told Mr. O'Sullivan to "get on with it" meaning to get a grievance going for the complainant. Mr. O'Sullivan testified that he then spoke with the complainant and gave him a "fact sheet" to fill out and return to him so that he could proceed to file a grievance. According to the union, this fact sheet accompanies the grievance form which would then be submitted to another union officer, a Mr. McKinnon who would initiate a discharge grievance at the 2nd stage of the grievance process.

Mr. O'Sullivan volunteered the information that he had acted on behalf of the complainant on a previous occasion involving discipline for leaving mail in a relay box overnight. (This incident is referred to in the termination letter of February 22, 1989). Mr. O'Sullivan claimed that the complainant had told him that he had not left the mail in the relay box as alleged, however, at the interview with CPC, the employer had the mail in its possession. Mr. O'Sullivan said that because of that past experience with the complainant he wanted to ensure he had the complainant's version of the facts before he proceeded. Under questioning from the Board, Mr. O'Sullivan was emphatic that he had given the complainant a fact sheet to fill out and to return to him. He also testified that he had explained the importance of the fact sheet to the complainant and that the grievance would not go forward without it. Never having received the completed fact sheet from the complainant, Mr. O'Sullivan said that he assumed that the complainant had decided not to proceed with his grievance. In short, no grievance was ever filed on behalf of the complainant regarding his discharge.

The complainant's story was that after the Step 1 grievance meeting with Mr. Leeder, Mr. O'Sullivan gave him two blank forms to sign and said that he would take it from there. As far as he was concerned the grievance process was underway. The complainant was adamant that Mr. O'Sullivan had not supplied him with a fact sheet to complete, nor had he said anything to the effect that a grievance could not be filed until this fact sheet had been returned to O'Sullivan. The complainant went on to say that in early May he had called Mr. O'Sullivan about his grievance and was told that it would take a long time. Mr. O'Sullivan denied that this phone call took place.

The complainant testified that on or about July 24, 1989 he was told that Mr. O'Sullivan had quit. He said that he called O'Sullivan at home to inquire about his grievance and O'Sullivan confirmed that he was no longer with CPC and that he had better talk to someone else in the union. As a result, the complainant attended at CUPW's Toronto office the next day where after a search he was told that his grievance must have been lost. He said that he was told it would take a couple of days to complete the inquiry but it looked like his only recourse would be to go to the Labour Board. Shortly thereafter the complainant received the following letter from CUPW dated August 1, 1989:

"Dear Mr. Shehata:

Please be advised, upon investigation by the Canadian Union of Postal Workers, that a grievance has not been filed on your behalf by the former Letter Carrier Union of Canada.

We have checked our records at the Local, Regional and National levels as well as the records of the L.C.U.C. former Local #190. The grievance, if processed now, would exceed the time limits of the collective agreement.

Yours sincerely,

*Larry Lukkarinen
2nd Vice-President
Grievance Officer
Toronto Local C.U.P.W."*

As stated earlier the complainant filed his complaint with the Board on October 27, 1989.

III

Dealing first with the issue of the timeliness of the complaint which the union drew to our attention but did not argue too strenuously, we turn to section 97(2) of the Code which provides:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

It was established through the Board's investigation and confirmed at the hearing that the complainant learned on July 25, 1989 that his grievance had been lost, at least, CUPW informed him on that date that no grievance had been filed on his behalf. It was this date that the union relied upon to argue that the 90 days provided for in section 97(2) should start running. We, however, disagree with this assertion as, according to the uncontradicted evidence of the complainant he certainly was told on July 25th that there was no trace of a grievance being filed in his name, however, he was also told that it would take a couple of days for the union to inquire further into the circumstances and that they would be in touch. The letter to the complainant from CUPW's Mr. Larry Lukkarinen dated August 1, 1989, appears to corroborate this fact. Taking the date of this letter, August 1, 1989 as the date upon which the complainant knew or ought to have known about the circumstances giving rise to his complaint, the complaint is timely. It is the opinion of the Board that the August 1 date is the proper date to use for the purposes of section 97(2). The complaint is therefore timely.

Turning to the credibility issue between the testimony of the complainant and Mr. O'Sullivan on the crucial question of whether two blank forms were signed and left with Mr. O'Sullivan or whether Mr. O'Sullivan gave the complainant a fact sheet to fill out and return to him, after great difficulty, the Board accepts the evidence of the complainant. It seems to us that the

complainant's version is the more likely for the following few reasons which tipped the balance in the complainant's favour.

First, the complainant was not knowledgeable about the grievance process but he said he had to sign two blank forms. This is in keeping with the union's evidence that two documents are required; a grievance form and a fact sheet. Secondly, we are of the view that had the complainant received a fact sheet to fill out, he would have done so. He does not appear to be the type of person to walk away from an opportunity for redress. His tenacity before this Board, the Human Rights Commission, and the Workers Compensation Board support this theory.

Then there was the two alleged phone calls from the complainant to Mr. O'Sullivan. The first phone call was supposed to have been made in May and Mr. O'Sullivan was quoted as letting the complainant know that his grievance would take a long time. Mr. O'Sullivan emphatically denied that this ever took place. The Board sees no way to resolve this contradiction in the evidence.

The second phone call is, however, more telling. This call was made some time in July to Mr. O'Sullivan after he had left the employ of CPC, probably on July 24. Mr. O'Sullivan does not deny that the call took place, in fact both he and the complainant gave almost the same version of the conversation. When asked about the grievance, Mr. O'Sullivan said that he had left CPC and that the complainant should talk to someone else at CUPW. What we cannot understand is why Mr. O'Sullivan, who appears to be an aggressive type of person, did not simply remind the complainant that he had never returned the completed fact sheet to him; therefore, no grievance had ever been filed. This would seem to us to be the logical thing for Mr. O'Sullivan to say even if he was no longer employed by CPC. Why would he, knowing that the grievance had never been filed, send the complainant on a wild-

goose chase after a non-existing grievance. This led us to believe that in the balance of probabilities the complainant's version of what transpired was the more likely. Having reached this conclusion, there is no alternative in the absence of any other explanation but to find that for whatever reason, Mr. O'Sullivan simply failed to file the grievance for the complainant as he had been told to do by Mr. Lawrence. This can only be described as gross negligence considering that it was a discharge grievance.

Accordingly, CUPW is found to have violated section 37 of the Code.

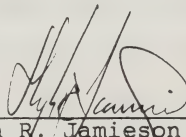
IV

On the question of remedies in these situations, the Board more often than not orders an offending trade union to foot the bill for neutral counsel to represent a complainant at arbitration, however, we will take into account that at the time these circumstances arose CUPW had not had time to properly take over the reins from the LCUC. Further, LCUC officers were still acting in their capacities under the collective agreement in CUPW's stead. We must still, of course, put the complainant back in the position he would have been in but for the violation of the Code, therefore, for the time being at least, we shall simply use the Board's remedial powers under section 99 of the Code to waive all time limits in the relevant collective agreement which may be a bar to the complainant's grievance and order CUPW to file and process a grievance on the complainant's behalf and to take the grievance to arbitration if necessary.

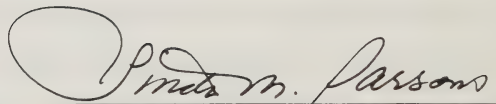
If the grievance is settled at any stage of the grievance process with compensation being payable to the complainant, such compensation will be payable by CUPW from the date of discharge

up to and including the date the grievance is filed. CPC will be liable for any compensation accruing after that date. Similarly, if the matter proceeds to arbitration and, if the arbitrator sees fit to award compensation to the complainant, such compensation will be payable by CUPW from the date of discharge to the date the grievance is filed. CPC will be liable for any compensation accruing after that date. In either of these situations if compensation is awarded, the amount of Workers' Compensation Benefits which the complainant has received since his date of discharge will be deducted from any amount of compensation due. This reference to Workers' Compensation Benefits is not to be construed as limiting any other mitigation of damages which would ordinarily be applied to a compensation award.

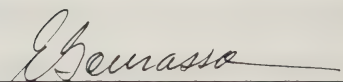
The Board retains jurisdiction to deal further with the complaint and anything arising therefrom, including, but not restricting it to, the issuance of a formal order should the need arise.



Hugh R. Jamieson
Vice-Chairman



Linda M. Parsons
Member



Evelyn Bourassa
Member

DATED at Ottawa this 4th day of July, 1990.

information

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Summary

CANADIAN UNION OF POSTAL WORKERS,
APPLICANT, AND CANADA POST
CORPORATION AND FAMILY FARE STORE,
HULL FOODS, CHARLESWOOD FLORIST, AND
CONSUMERS DRUG MART LTD.,
RESPONDENTS.

Board Files: 585-241
585-242
585-251
585-252
585-253
585-257
585-258

Decision No.: 808

Résumé de Décision

LE SYNDICAT DES POSTIERS DU CANADA,
REQUÉRANT, AINSI QUE LA SOCIÉTÉ
CANADIENNE DES POSTES, FAMILY FARE
STORE, HULL FOODS, CHARLESWOOD
FLORIST ET CONSUMERS DRUG MART LTD.,
INTIMÉS.

Dossiers du Conseil: 585-241
585-242
585-251
585-252
585-253
585-257
585-258

Décision n° 808

In these applications the Board was asked, pursuant to section 44 of the Code, to determine that Canada Post Corporation had sold a part of its business to one of the other respondent retailers (two pharmacies, a food store and a florist). The retailer provided postal services at special counters within their retail operations. The rights to provide postal services were not exclusive, and there was no significant correspondence between these operations and the closing of a Canada Post postal station. Any effects on Canada Post employees did not touch bargaining rights as such. It was held, following the Canada Post Corporation and Rideau Pharmacy Ltd. (1989), 1 CLRBR (2d) 239; and 89 CLLC 16,019 (CLRBR no. 737) and the Canada Post Corporation and Nieman's Pharmacy (1989), 4 CLRBR (2d) 161 (CLRBR no. 742) cases, that the retailers had, in effect, been licensed to perform certain aspects of postal service and to purchase at wholesale postal products which would then be sold at retail. This did not constitute a sale or other disposition of business within the meaning of the Code.

Dans ces affaires, le requérant demande au Conseil, aux termes de l'article 44 du Code, de déterminer si la Société canadienne des postes (la Société) a vendu une partie de son entreprise à l'un des détaillants intimés (deux pharmacies, un magasin d'alimentation et un fleuriste). Les détaillants fournissent des services postaux à des comptoirs spéciaux dans le cadre des activités de leur entreprise. Les droits de fournir des services postaux ne sont pas exclusifs, et il n'y a pas de lien important entre ces activités et la fermeture d'une succursale postale. Les conséquences de ces activités sur les employés de la Société ne touchent pas les droits de négociation comme tels. Le Conseil a jugé, en se fondant sur les affaires Canada Post Corporation and Rideau Pharmacy Ltd. (1989), 1 CLRBR (2d) 239; et 89 CLLC 16,019; décision du CCRT n° 737, non encore rapportée en français; et Canada Post Corporation and Nieman's Pharmacy (1989), 4 CLRBR (2d) 161; décision du CCRT n° 742, non encore rapportée en français, que les détaillants ont en fait été autorisés à fournir certains services postaux et à acheter en gros des produits postaux qu'ils revendront ensuite au détail. Ces transactions ne constituent pas une vente ou une autre forme de disposition d'entreprise au sens du Code.



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Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation and Family Fare Store, Hull Foods, Charleswood Florist, and Consumers Drug Mart Ltd.,

respondents.

Board Files: 585-241
585-242
585-251
585-252
585-253
585-257
585-258

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Robert Cadieux and Michael Eayrs, Members.

Appearances:

Mr. Gaston Nadeau, for the applicant;

Mr. George Adams, for respondent Canada Post Corporation;

Mr. W.D. Hamilton, for the other respondents.

Hearings in these matters were held at Winnipeg on April 3, 4, 5 and 6, 1990, and at Ottawa on April 17, 1990.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

I

The present applications were, as a matter of convenience, heard together, although they were not consolidated. Having heard the evidence relating to each of the applications we are of the view, and counsel do not disagree, that while each of the situations before

us has certain individual characteristics, the cases are fundamentally similar. In our view the individual differences in the cases now before us are not significant in respect of these applications, and the outcome should be the same in each case.

The material facts are very similar with respect to each of the applications before us, and there is no significant dispute between the parties as to what those facts are. In each case respondent Canada Post Corporation (CPC) has entered into an agreement or set of agreements with the respondent retailer, which agreements have the following effects.

1. The retailer, in each of the cases before us, has expended or is committed to expend its own funds to provide facilities (approved by CPC) within its retail store for the provision of certain postal services.

2. The retailer, in most cases, has purchased lock boxes to which it will distribute mail for pick-up by those of its customers who may rent such boxes from it.

3. The retailer purchases, at wholesale, postal supplies and "postal values" (notably postage stamps) from CPC, which it then retails to its customers, and which it may itself sell at a discount from face value to stamp agencies (with whom it makes its own arrangements) for sale at retail to their customers.

4. The retailer provides certain postal services of a sort normally provided at a postal station to its customers. These include "call for" service (where a letter carrier has left a card at an addressee's home or office), registered mail, money orders, parcel post, the

setting of postage meters and the like. Not all of the retailers affected by the present applications provide the full range of such services, but we do not consider the variations from the norms described above to be significant in these cases.

5. The retailer purchases point-of-sale computerized equipment as specified by CPC, and conducts the postal operations involved in accordance with CPC's manuals.

Pursuant to such agreements, then, the retailers conduct operations similar to those which were once well known as "sub post offices". In some of the cases before us, the retailer had in fact operated such a sub post office prior to entering into the agreements which have been described. The retail operations above described are now referred to by the parties as "gross margin outlets". In each case, the retailers conduct their postal business in the context of a larger principal business, whether it be a pharmacy, a convenience store, a florist or some other form of retail business. The postal operations make a relatively insignificant contribution to the total revenues of the store in each case. Their principal value to the retailer is that they bring in or maintain customers.

What is of value to the retailers, and the justification for their expense in providing these postal facilities, is the ability to offer an additional service to customers. In this regard, it is to be noted that in connection with the postal service facility, the retailers in question typically, although not always, provide an outlet for the sale of lottery tickets or theatre seats. Again, these services are provided using

computers and operational manuals developed by the lottery corporation or theatrical agency (although in those cases the capital outlay required of the retailer would appear to be less than in the case of postal services). In some cases, the retailers also sell bus tickets for Winnipeg Transit, and accept payment for utility bills.

II

There are two significant differences between the present cases and the earlier case of Canada Post Corporation and Shoppers Drug Mart Limited (Sheldon Manley) (1987), 70 di 103; 1 CLRBR (2d) 218; and 87 CLLC 16,049 (CLRB no. 649). In the present cases CPC has not granted the retailers any exclusive right to be providers of postal services within a defined area, and there is nothing to support any inference that the provision of new or extended postal services by any of the respondent retailers corresponded in any significant way with the closing of any of CPC's own postal stations. It is true that in some cases the retailers may appear to be to some extent in competition with nearby postal stations, and that some of their customers are obtaining from them postal services they had formerly obtained from postal stations. It cannot be said, however, that in the instant case CPC simply ceased operations at any particular station in order to have such operations carried on through the intermediary of any or all of these retailers.

It is not necessary, in our view, to categorize the relationship between CPC and the retailers in any particular way in order to reach a conclusion in the instant case. In some respects, it would seem that CPC

has, as it maintains, simply "contracted out" certain of its operations. In the instant cases, however, that phrase does not apply with quite the same force that it has in other industrial relations situations. Thus, in some cases, CPC may use its own trucks to transport mail from one city to another while in others, it may arrange with a private contractor to perform that work: it "contracts out" the hauling of mail in the latter cases. The contract is to perform, on behalf of CPC, work which CPC requires to have performed in the course of carrying out its own business. (It does not appear that such contracts have been the subject of any "sale of business" applications under the Code, but that is not a question on which we need express any opinion here.) In the instant cases, the retailers do not work for CPC, or on its behalf. The analogy with the contracting out of trucking work, and similar analogies with contracting out in other typical situations such as those involving cleaning or security services, or the manufacture, treatment or testing of component parts, are not exact.

In other respects, the provision of certain postal services or the sale of "postal values" by retailers in the manner described above may be considered to be a "franchise": the retailer offers certain postal products and services in a standardized way under the CPC logo, in accordance with CPC standards and subject to its controls. In yet another way, the retailers may be seen as simply that: selling at retail products acquired from CPC as wholesaler. Indeed, the retailers in question here do, in varying degrees, have arrangements with suppliers which include the provision of displays and participation in co-operative advertising. The retailers advertise the availability of postal services at their stores in much the same way as they advertise anything

else.

While one or another of these labels may be of help in the description of the situation, there are no necessary legal consequences that, in the present cases, must follow from such characterization.

III

In the present cases, the Board is called on to determine whether or not there has been a sale of a business within the meaning of sections 44 and 45 of the Canada Labour Code. Those provisions are as follows:

"44. (1) In this section and sections 45 and 46, 'business' means any federal work, undertaking or business and any part thereof; 'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

45. (1) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, the Board may, on application to it by any trade union affected,

(a) determine whether the employees affected by the sale constitute one or more units

appropriate for collective bargaining;

(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and

(c) amend, to the extent the Board considers necessary, any certificate issued to a trade union or the description of a bargaining unit contained in any collective agreement.

(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union.

(3) Either party to a collective agreement referred to in subsection (2) may, at any time after the sixtieth day has elapsed from the date on which the Board disposes of an application made to it under subsection (1), apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(4) On application being made to it pursuant to subsection (3), the Board shall take into account the extent to which and the fairness with which the provisions of the collective agreement, particularly those dealing with seniority, have been or could be applied to all the employees to whom the collective agreement is applicable."

The term "sell" as it is used in section 44 of the Code is to be given a broad definition. As section 44(1) states, it includes "transfer" ("transfert") and "other disposition" ("toute autre forme de disposition"). As the Board put it in Seaspan International Ltd. (1979), 37 di 38; and [1979] 2 Can LRBR 213 (CLRB no. 190):

"We believe that a broad and liberal interpretation of the term 'transfer' in the definition of 'sell' found in section 144 [now section 44] of the Code is necessary to effectuate the purpose of the successorship provisions of the Code when a business changes hands by means other than those readily recognizable as a sale in the normal commercial sense. The focus of the Board's attention in such cases is neither upon the formalities of ownership or the particular method whereby the business changes hands. The Board is concerned more with realities than appearances and its inquiry is directed towards the establishment

of the identity of the employer who has acquired, by a means encompassed by section 144, the control and use of a business. ..."

(pages 43-44; and 218)

There is no question of identity of the employer in the cases before us. The question rather is whether or not a part of a business has been transferred or otherwise disposed of as between CPC and each of the retailer respondents. In Terminus Maritime Inc. (1983), 50 D.L.R. 178; and 83 C.L.L.C. 16,029 (CLRB no. 402), the Board adopted a "dynamic" interpretation of "business", following the decision of the Ontario Labour Relations Board in Metropolitan Parking Inc., [1979] O.L.R.B. Rep. Dec. 1193, which in turn relied on the remarks of Widjery, J. in Kenmir v. Frizzell et al., [1968] 1 All E.R. 414. The vital consideration, it was said by the Ontario Board, "is whether the transferee has acquired from the transferor a functional economic vehicle".

In Terminus Maritime, supra, two shipping companies had contracted out their stevedoring work in the port of Montréal to two separate stevedoring companies, each of which was bound by a collective agreement with a different trade union. Then the two shipping companies amalgamated to form a new company. The new company gave its stevedoring contract to one of the stevedoring companies, and the trade union representing the employees of the other stevedoring company applied for a determination that there had been a sale of business within the meaning of the Code. That application was dismissed. Clearly, the contract held by the stevedoring company did not in itself constitute a "business", and in any event there had been no "disposition" of that by the one stevedoring company to the other. It is interesting to note, however, that prior to the

amalgamation one of the shipping companies, which had previously carried out stevedoring operations using its own employees, contracted with one of the stevedoring companies to perform that work, the stevedoring company doing so using its own employees as well as some former employees of the shipping company. In that case (Board file no. 585-60), the Board found there had been a sale of business from the shipping company to the stevedoring company. Both the employees of the shipping company and those of the stevedoring company had been represented by a trade union. The Board determined that the collective agreement binding the stevedoring company applied with respect to the stevedoring operations involving the shipping company's ships. That conclusion would, however, appear to have been dictated more by the scope of the bargaining rights held by the trade union representing the stevedoring company's employees, and by an agreement apparently reached by the parties previous to the Board's "letter decision" than by any determination that there had been a sale of a business. Indeed the actual conclusion of that earlier case was that the request to withdraw the application was granted. It is nevertheless a possibility that a "business" or part of one may be "disposed of" by means of contracting-out arrangements. As the Board said in Terminus Maritime, supra:

"... The fact that the business is transferred by direct agreement between the purchaser and the seller (for example, sale, lease or subcontract) or in a more indirect manner, as in the case of contracts awarded following calls for tenders, is not a bar to the application of section 144. ..."

(pages 184; and 14,239)

When "business" and "disposition" are interpreted in a broad and liberal way, as we agree they must, to give effect to the purpose of the material provisions of the

Code, it becomes apparent, when such interpretations are applied to particular cases, that there is a danger of giving a strict "conservative" construction to terms which have been so "liberally" defined, and thus of giving to the Code an application it was never intended to have. As well, it leads to contradictions. The sale of postage stamps, for instance, may quite properly be said to be a "part" of the "business" of running postal operations in Canada. Such sale constitutes the major part of the postal operations undertaken by the retailers in these cases. But while this, and other indicia, are relied on as indicating that a sale has taken place within the meaning of the Code, it is recognized at the same time that the establishment by the retailers of "stamp agencies" to whom the retailer in turn discounts stamps purchased from CPC does not constitute the sale of part of a business within the meaning of the Code. There is at least an apparent contradiction in this, although it may be that the contradiction is resolved by some sort of recognition that there are "limits".

The problem in the instant cases, as we have said, is not one of identification of the employer, nor is it one whose analysis is advanced by concentration on the nature of "business". Rather should we consider the broad purpose of the material sections of the Code, and whether the circumstances here are of the sort there contemplated. Is this a situation in which the consequences set out in sections 44 of the Code were intended to apply? As was said in Canada Post Corporation and Rideau Pharmacy Ltd. (1989), 1 CLRB (2d) 239; and 89 CLC 16,019 (CLRB no. 737): "Sections 44, 45 and 46 are remedial. Their purpose is, broadly defined, to protect against the loss of rights. Other provisions are more directly aimed at their acquisition." (Pages

256; and 14,202; emphasis in original.) Again, in Canada Post Corporation and Nieman's Pharmacy (1989), 4 CLRBR (2d) 161 (CLRB no. 742), it was said that:

"First we must look to the purpose of these successor rights provisions in the Code. If one studies the jurisprudence, it becomes readily apparent that there is unanimity in previous decisions emanating from this Board and from other jurisdictions that these provisions in labour legislation are designed to preserve existing bargaining rights and to protect rights and privileges acquired by employees under a collective agreement in the event that the employing authority of a business changes hands. ..."

(page 174)

The purpose of the material provisions of the Code, then, is to protect existing bargaining rights. In the instant case, it was argued that because of a diminution in the number of "wicket positions" resulting from CPC's practice of establishing more and more gross margin outlets, there were fewer preferred positions available and thus an adverse effect on employees. However that may be, such effects relate to the perceived advantages which may happen to be enjoyed in particular circumstances. They do not touch bargaining rights as such, and do not support the conclusion that a sale of business within the meaning of the Code has occurred.

In Saskatchewan Liquor Board et al. (1985), 85 CLLC 16,039 (SLRB), the Liquor Board, for certain of whose employees the applicant trade union held bargaining rights, authorized the Saskatchewan Brewers' Association to sell and deliver beer to licencees, thus performing (or arranging for the performance of) certain functions which the Liquor Board had previously performed through its Central Beer Offices. The two Central Beer Offices were then closed, and six employees laid off. The

Saskatchewan Brewers' Association opened a new office and hired new employees. The case thus presents a close structural analogy to the instant cases, although the business of the Saskatchewan Brewers' Association at the office in question would appear to have been devoted exclusively to the sort of work previously carried on by the Liquor Board in respect of beer sales. It was held that the successorship provisions of the Trade Union Act of Saskatchewan (which are generally similar to those of the Code), did not apply to that arrangement. The Saskatchewan Labour Relations Board stated:

"Subcontracting or contracting out can amount to a disposition within the meaning of Section 37 [case cited]. Arrangements of that kind have often been held to be outside of the scope of successorship legislation, however, because they amount to a change in the method of carrying on business rather than a transfer of the business itself. In cases of that kind, what is transferred is generally only the predecessor's work. ..."

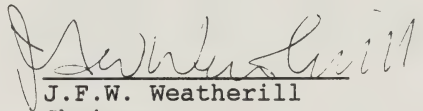
(page 14,260)

In the instant cases, as in Saskatchewan Liquor Board, supra, the retailers have, in effect, been licenced to perform certain aspects of postal service (although these licences are not exclusive, as the licence was in that case), and have been allowed to purchase at wholesale certain postal "products" which they then retail to the public or discount to their own sub-agents. Whether CPC be considered as, to some extent, "carrying out its responsibilities in a different way" (as the Saskatchewan Labour Relations Board put it with respect to the matter before it) or not, it still maintains an appropriate degree of control over the provision of postal services and fulfils its statutory mandate. It has not, in these cases at least, sold or otherwise disposed of its business or a part thereof, within the meaning of the Code. We do not have here the sorts of

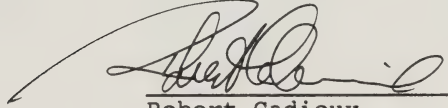
circumstances in which the bargaining rights of the applicant in respect of employees of CPC were meant to be extended to cover employees of the respondent retailers.

In the circumstances of the instant cases, then, it is our view that however the business arrangements between CPC and the retailers may be characterized, they do not amount to a disposition by CPC of a part of its business, within the meaning of the Code.

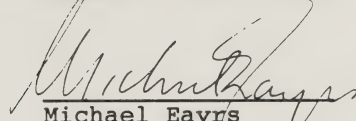
For all of the foregoing reasons, the applications are dismissed.



J.F.W. Weatherill
Chairman



Robert Cadieux
Member of the Board



Michael Eayrs
Member of the Board

DATED at Ottawa this 11th day of July, 1990.

CLRB/CCRT - 808

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Summary

GENERAL TEAMSTERS LOCAL UNION NO. 979,
APPLICANT; AND BURNS FOODS (TRANSPORT)
LTD., EMPLOYER.

Board File: 555-3119

Decision No.: 809

In this decision the Board found that
the operations of Burns Foods
(Transport) Ltd. constitute a federal
work, undertaking or business within
the meaning of section 4 of the Canada
Labour Code.

The Board took jurisdiction because
of the regular and continuous extra-
provincial activities carried on by
the employer.

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Résumé de Décision

LA SECTION LOCALE 979 DU SYNDICAT DES
TEAMSTERS, REQUÉRANTE; ET BURNS FOODS
(TRANSPORT) LTD., EMPLOYEUR.

Dossier du Conseil: 555-3119

N° de Décision: 809

Dans la décision qui suit, le Conseil
a jugé que l'entreprise de Burns Foods
(Transport) Ltd. constitue une
entreprise fédérale au sens où
l'entend l'article 4 du Code canadien
du travail.

Le Conseil s'est déclaré compétent au
caractère continu et régulier des
activités extra-provinciales exercées
par l'employeur.



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Reasons for decision

General Teamsters Local Union
no. 979,

applicant,

and

Burns Foods (Transport) Ltd.,
employer.

Board File No.: 555-3119

The Board was composed of Vice-Chairman Hugh R. Jamieson,
and Members Jacques Alary and Robert Cadieux.

The reasons for this decision were written by Vice-
Chairman Hugh R. Jamieson.

Appearances:

A.R. McGregor, Q.C., and David Lewis, for the applicant.
Lorne H. Jacobson, for the employer.

I

These reasons deal solely with the question of this
Board's constitutional jurisdiction to regulate the labour
relations of Burns Foods (Transport) Ltd., (the employer).
This issue arose in an application for certification which
was filed on April 17, 1990 by the General Teamsters Local
Union 979 (the union or the Teamsters), seeking to
represent certain employees of the employer.

A hearing was held in this matter at Winnipeg on May 31,
1990.

On June 4, 1990 the parties were notified that the Board had taken jurisdiction over the operations of the employer which are affected by the application for certification.

These are the Board's reasons for having so decided.

II

The employer's operations are one of a large family of companies which are related to Burns Foods (1985) Ltd., these companies are involved in meat packaging and distribution as well as frozen fruits and vegetables and other grocery and confectionery commodities. The employer was incorporated in 1974 when a need arose, because of a national railway strike, to have a dependable means of transportation throughout its network of related outlets across Canada. As a subsidiary of Burns Foods (1985) Ltd., the employer is the prime carrier for Burns Meats and for Scott National Co. Ltd.

When one envisages someone transporting their own commodities, even if it is inter-provincial transportation, the first reaction in a constitutional sense is that the operation would be provincial. Companies like Sears, Eatons, Canadian Tire, etc. constantly haul their own goods across provincial boundaries yet their operations remain provincial. In the case of the employer, however, there are some distinct features of its operations which bring it within federal jurisdiction. These are the regular and continuous inter-provincial transportation of goods for other companies, the majority of which are back-haul trips.

Let us attempt to give a clearer picture of what we mean by "back-haul". The employer's head office is located at Calgary, Alberta and it also has depots at Vancouver, Prince George, Penticton, Edmonton, Calgary, Saskatoon, Regina, Winnipeg, Toronto and Halifax. The vast majority of the equipment used by the employer is contracted through owner-operators and, to illustrate the size of the operation, it is estimated that the employer has some 165 trailers and uses some 100 power units across its system.

The foregoing equipment is used primarily to carry Burns' and related companies' goods and products to and from its packaging, storage and retail outlets across the country. However, in addition to hauling its own commodities the employer does hold itself out as a common carrier and it has developed a practice of carrying general freight for others on the return journeys. These back-hauls bring in additional revenues and make more economical use of the equipment rather than the vehicles returning to their base empty. Some of the other companies for which the employer carries goods include:

- Snow Crest Packers Limited (B.C.)
- Cavendish Farms (P.E.I.)
- B.C. Tree Fruits Ltd.
- Cambra Foods Limited (Alta.)
- Palm Dairies Limited
- Hershey Canada Ltd.
- Western Grocers
- Freshwater Fish Corporation
- Fleishmans
- Canada Packers Inc.

Testimony by witnesses on behalf of the union clearly established that these back-haul runs occur on a regular daily or weekly basis and that the local pick-up and delivery persons employed by the employer at its Winnipeg base, as well as the warehousemen employed there, handle these goods which are being transported for other companies on a daily basis.

III

The employer attempted to show the Board that the income derived from these back-hauls was an insignificant percentage when viewed in comparison to its overall business. However, percentages are not definitive when assessing whether extra-provincial activities are sufficient enough to transform a provincial entity into a federal work, undertaking or business for the purposes of section 4 of the Code. The test is whether the extra-provincial operations occur on a regular and continuous basis rather than merely being of a casual nature. The leading cases on this point are: A.C. Ontario v. Winner, [1954] A.C. 541 (Privy Council); Regina v. Cooksville Magistrate's Court, Ex Parte Liquid Cargo Lines Ltd., [1965] 1 O.R. 84; Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd., [1960] O.R. 497; and Ottawa-Carleton Regional Transit Commission v. Amalgamated Transit Union, Local 279 (1983), 84 CLLC 14,006 (CLRB no. 406).

In The Gray Line of Victoria Ltd. (1989), 5 CLRB (2d) 226 (CLRB no. 741) the Board highlighted some pertinent comments by the Courts in some of these leading cases which clearly establish the regular and continuous test:

"The Liquid Cargo Lines Ltd., supra, decision stands for the principle that regular and continuous does not necessarily mean that extra-provincial trips have to be made in accordance with a predetermined schedule. In this case the Court took into account the fact that the operator of the business stood ready at any time to provide extra-provincial service:

'In my view, the fact that many of the applicant's extra-provincial trips are not made at fixed times in accordance with a predetermined schedule does not compel the conclusion that its activity in that regard is not continuous and regular. Viewed from the point of view of the applicant company, it is clear that its customers are provided with extra-provincial service consistently and without interruption whenever they apply to the applicant for such service. The

applicant stands ready at any time to engage in hauls outside the boundaries of the Province of Ontario at the instance of any of its customers, and for that purpose has gone to the pains and expense of acquiring transport permits and licences from a number of jurisdictions. Further, the evidence is clear that it has made such trips frequently during the period for which figures have been provided.'

(page 88; emphasis added)

In Tank Truck Transport Ltd., supra, the Court said that occasional or irregular extra-provincial operations do not transform a provincial undertaking into a federal undertaking; again, the Court referred to the regular and continuous test:

'I agree with counsel for the respondent that not every undertaking capable of connecting Provinces or capable of extending beyond the limits of a Province does so in fact. The words connecting and extending in section 92(10)(a) must be given some significance. For example a trucking company or a taxicab company taking goods or passengers occasionally and at irregular intervals from one Province to another could hardly be said to be an undertaking falling within section 92(10)(a)... I think that to connect or extend, that activity must be continuous and regular, but if the facts show that a particular undertaking is continuous and regular, as the undertaking is in this case, then it does in fact connect or extend and falls within the exception in 10(a) regardless of whether it is of greater or less in extent than that which is carried out within the Province.'

(page 508; emphasis added)

In the Ottawa-Carleton Regional Transit Commission, supra, case a quantitative test was rejected in favour of the regular and continuous test:

'There are difficulties inherent in a quantitative approach. For example, the question must always arise, where should the line be drawn in any particular case? Should the crucial percentage be 80-20, 90-10, 95-5 or 60-40? If a quantitative approach is to be taken, then should a very large corporation with a small but regular extra-provincial business representing four per cent of its operations be in a different category from a small concern with the same amount of extra-provincial business but, because of its smaller total operation, the extra-provincial work amounting to 50 per cent of its total? Should the labour

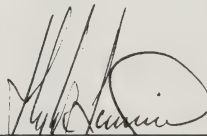
relations of the smaller concern be regulated by a different body than those of the larger business? In my view, the quantitative approach should not be adopted. Rather, the determination of the essential issue as to whether the undertaking connects provinces should be based upon the continuity and regularity of the connecting operation or extra-provincial business.'

(pages 12,030-12,031; emphasis added)"

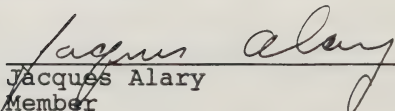
(The Gray Line of Victoria Ltd. (1989), 5 CLRBR (2d) 226 at pages 231-232)

Applying the regular and continuous test to the facts of the case before us here, there can be little doubt that the extra-provincial operations carried on by the employer are sufficient to oust the primary provincial competence rule and bring the employer's operations within the scope of Part I of the Code for labour relations purposes.

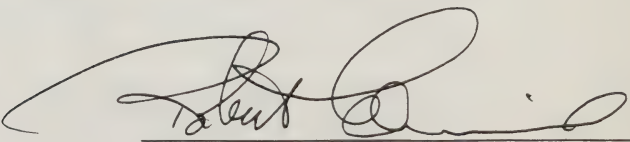
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chairman



Jacques Alary
Member



Robert Cadieux
Member

DATED at Ottawa this 11th day of July, 1990.

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Summary

GENERAL TRUCK DRIVERS AND HELPERS
LOCAL UNION NO. 31 OF THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, APPLICANT; AND
CF PARCEL EXPRESS, EMPLOYER.

Board File: 555-3105

Decision No.: 810

Résumé de Décision

LA SECTION LOCALE 31 (GENERAL TRUCK
DRIVERS AND HELPERS) DE LA FRATERNITÉ
D'AMÉRIQUE DES CAMIONNEURS,
CHAUFFEURS, PRÉPOSÉS D'ENTREPÔTS ET
AIDES, REQUÉRANTE; ET CF PARCEL
EXPRESS, EMPLOYEUR.

Dossier du Conseil: 555-3105

N° de Décision: 810

In this decision the Board found that
the operations of CF Parcel Express
constitute a federal work, undertaking
or business within the meaning of
section 4 of the Canada Labour Code.

The Board took jurisdiction because
the operations of CF Parcel Express
and those of Canadian Freightways
Limited, of which CF Parcel Express
is a division, were in fact one fully
integrated inter-provincial
transportation business.

Dans la décision qui suit, le Conseil
a jugé que l'entreprise de CF Parcel
Express constitue une entreprise
fédérale au sens de l'article 4 du
Code canadien du travail.

Le Conseil s'est déclaré compétent
parce que les entreprises de CF Parcel
Express et de Canadian Freightways
Limited, dont CF Parcel Express est
une division, sont en fait une
entreprise intégrée de transport
interprovincial.



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Reasons for decision

General Truck Drivers and
Helpers Local Union No. 31 of
the International Brotherhood
of Teamsters, Chauffeurs,
Warehousemen and Helpers of
America,

applicant,

and

CF Parcel Express,

employer.

Board File: 555-3105

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chairman, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Ms. Shona A. Moore, for the applicant; and

Mr. David Corry, for the employer.

These reasons for decision were written by Mr. Michael Eayrs, Member.

The Proceedings

On March 31, 1990, the General Truck Drivers and Helpers Local Union No. 31 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") filed an application for certification under section 24 of the Canada Labour Code (Part I - Industrial Relations). The Union asked to be certified for a unit that included all employees of CF Parcel Express (hereinafter "CFPX") in British Columbia except supervisory and sales staff and owner/operators.

Following receipt by the Board of the various parties' submissions on the certification question, the Board decided to hold a hearing on June 7, 1990 in Vancouver, British Columbia, restricted to the issue of its constitutional jurisdiction over CFPX.

The Facts

CFPX is a division of Canadian Freightways Limited (hereinafter "CFL"). CFL transports goods between provinces. No one disputed the fact that CFL operates an interprovincial undertaking. The issue between the parties is whether CFL's division, CFPX, also falls within federal jurisdiction.

While CFL clearly transports goods between provinces, CFPX describes itself as a "freight forwarder" that never transports goods across provincial boundaries. It argues that its activity is wholly provincial notwithstanding its obvious links with its parent company, CFL.

CFL established CFPX on November 5, 1985. Its head office is in Calgary, Alberta, though this application concerns only its office in Delta, B.C. CFPX has also established an office in Manitoba. CFPX limits itself to handling small parcels or shipments totalling no more than 100 pounds. While CFPX in British Columbia occupies an office distinct from that of CFL, it shares space with CFL in other provinces. CFPX works out of the CFL head office in Calgary and has another shared office with CFL in Winnipeg.

CFPX and CFL appear separate in certain areas yet clearly linked in others. For example, CFPX has its own envelopes, letterhead, invoice forms, income statements, bills of lading

and brochures. The rates for CFPX's services differ from those offered by CFL. CFL transports large shipments usually totalling more than 100 pounds and performs line hauling for CFPX and other companies. CFPX, on the other hand, consolidates goods it receives at its loading dock, then uses line haulers, notably CFL, to provide interprovincial transportation and delivery. CFPX has its own dock employees, administrators, agents, and salesmen.

Customers of CFPX send their payments to CFPX's post office box in Calgary. CFPX has its own bank account number in Calgary though, apparently, has no local bank account number for its local office in Delta, B.C.

The Board heard evidence of CFPX operating just like any freight forwarder. However, unlike standard freight forwarders, it shares a number of significant activities with its parent, CFL. For example, CFL provides many computer and accounting services for CFPX. CFPX uses CFL's computer and pays for that use. CFPX has developed its own billing software. Among the computer and accounting services provided to CFPX, CFL prepares the payroll for CFPX employees. All CFPX employees punch time cards that bear the CFL insignia. CFPX employees receive their salary on CFL-issued cheques.

CFL's labour relations manager, Mr. Ken Czech, handles CFPX's labour relations. The Union deals directly with Mr. Czech rather than with Mr. Donald Chapman, General Manager of CFPX in Calgary. Mr. Chapman reports directly to the President of CFL. For example, CFL and the Union negotiated a letter of understanding concerning the creation of CFPX which is appended to their collective agreement. The letter prohibits CFPX employees from performing CFL employees' work at CFL

terminal docks. CFL did not consult Mr. Chapman prior to signing the letter of understanding. In fact, Mr. Chapman testified that he had no knowledge of that letter of understanding prior to its negotiation and signing.

CFL looks after workers' compensation issues for CFPX and pays the required premiums for CFPX employees directly to the Workers Compensation Commission.

CFL provides other services to CFPX. Should a parcel go missing, CFL's Claims Department handles the matter. While CFPX provides all the documents concerning the claim, CFL takes over the tracing and settlement from there.

CFPX owns several three-ton and one-ton trucks. The owner of the vehicles is described as CFPX, a division of CFL. Exhibit no. 4 produced at the hearing indicated that purchases by CFPX of major items like the trucks had to be approved by CFL's Board of Directors.

On occasion, CFL and CFPX's salesmen make joint calls on actual and potential customers. Should such a call bring in a new customer, both CFL and CFPX salesmen share in the benefits of CFL's bonus system. Sales coordination extends as well to advertising. For example, CFPX advertisements appear on various CFL trucks.

CFPX uses CFL's line hauling services for most of its goods. CFL carries approximately 75% of CFPX's tonnage. Only if CFL does not deliver to a particular area will CFPX use another line hauler. For example, there was evidence that while some urgent shipments to Toronto travel with line haulers other than CFL, for non-urgent shipments CFPX uses CFL which

delivers the goods about a week later in Toronto. According to the evidence, approximately 90% of CFPX shipments leaving British Columbia use CFL as the line hauler.

The Parties' Submissions

On these facts the Board must decide whether CFPX is a freight forwarder whose business is entirely provincial or whether CFPX, for various reasons, constitutes a federal undertaking.

CFPX argued that one must consider its operations and not its particular corporate relationship with CFL. It maintained that while parcels under 100 pounds are consolidated by CFPX, other line haulers (including CFL) handle transportation across provincial boundaries. Indeed, CFPX has no licence to transport goods across provincial boundaries. CFPX argued the casual sharing of resources between CFL and CFPX is an efficient business practice but is no reason for this Board to find that CFPX's operations fall within its jurisdiction.

The Union asked the Board to find that CFL had created a wholly controlled division to service the courier or freight forwarding market. The Union raised the letter of understanding wherein CFL bound CFPX without any prior consultation. The Union also highlighted CFL's overwhelming presence in CFPX's matters.

The Union further pointed to the expenditure request form (exhibit no. 4) which showed that CFL authorized major CFPX expenditures. Finally, the Union pointed to the coordination of sales personnel as well as the marketing cooperation between the companies that goes far beyond a mere interlining agreement between independent companies.

In essence, the Union alleges that CFPX is merely an extension of CFL and not an independent freight forwarder.

The Decision

This case is similar to a recent decision of this Board in Emery Worldwide (1989), as yet unreported CLRB decision no. 768 (hereinafter Emery). (Coincidentally, CFL also owns Emery Worldwide.) In that decision, the Board found that the regional B.C. office of Emery Worldwide, an international freight transporter, fell within federal jurisdiction. The mere fact the regional office did not itself transport goods interprovincially could not sever it from Emery's core federal undertaking. While the facts in the two cases are not exactly the same, the principles set out by this Board in Emery, supra, apply to the instant case. CFPX falls within this Board's jurisdiction.

CFPX in our view is not a severable undertaking that conducts freight forwarding activities. CFPX is part of one indivisible federal transportation undertaking.

Why do CFL and CFPX form one indivisible undertaking? If one were to examine only the activities of CFPX, one might conclude it operates as a provincial freight forwarder. For example, in In Re Cannet Freight Cartage Ltd., [1976] 1 F.C. 174; and (1975), 60 D.L.R. (3d) 473 (Cannet), the Federal Court of Appeal held that a local Ontario freight forwarding company, which happened to use the services of the Canadian National Railway to transport goods interprovincially, did not come within this Board's jurisdiction. Chief Justice Jackett held as follows:

"... In my view, the only interprovincial undertaking involved here is the Canadian National interprovincial railway. Clearly, a shipper on that railway from one province to another does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking. If that is so, as it seems to me, the mere fact that a person makes a business of collecting freight in a province for the purpose of shipping it in volume outside the province by public carrier, does not make such a person the operator of an interprovincial undertaking."

(pages 178; and 475)

CFPX argues that it is in a comparable situation to Cannel Freight. Its use of CFL, a federal transportation undertaking, does not render it federal as well. CFPX also raises as further support for its position the Ontario Divisional Court's decision in Re The Queen and Cottrell Forwarding Co. Ltd. (1981), 124 D.L.R. (3d) 674 (Cottrell) (see especially page 679).

The above two freight forwarding cases covered situations where there existed no relationship between the freight forwarder and the core federal transportation undertaking. One had two proprietors and the question concerned whether, together, they operated one undertaking. Such a situation involves the application of the well-known principles outlined in Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 28 N.R. 107.

We believe that the analysis changes somewhat where the interprovincial undertaking, rather than being hired by contract by a separate freight forwarder, actually operates the very freight forwarder claiming provincial jurisdiction. In such a situation, the Board must determine whether the same proprietor operates one undertaking or two. The Emery decision, supra, applied the very same analysis.

Freight forwarding activities can sometimes fall within this Board's jurisdiction. For example, in Cannet, supra, Chief Justice Jackett gives an example of the type of activities that would come within federal jurisdiction. He stated:

"For example, if the railway has pick-up service in a city as a part of its overall transportation service, I should have thought that the employees concerned would be regarded as employed in connection with the railway. ..."

(pages 177; and 475)

Hyde, D.J. in a concurring judgment is even more specific when he states:

"... The CNR did not provide the services of Cannet or Cottrell for its freight customers. These were offered to the public by the latter who then on behalf of those customers picked up the goods and placed them in the CNR's cars which had been put at the latter's loading platform for that purpose."

(pages 183; and 479-480)

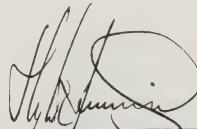
In this case the evidence shows that CFL set up CFPX, not to operate as a wholly independent freight forwarding operation, but rather as a necessary adjunct to CFL's interprovincial transportation operations and to promote CFL in the lucrative and ever-expanding small parcel carrier market. In these circumstances CFPX cannot fit within the rationale of the Cannet and Cottrell freight forwarding cases upon which CFPX relied so heavily.

The control of CFL over decisions made at CFPX is simply too widespread to find that CFPX was created to be an independent freight forwarding business. While businesses can help each other and still be separate undertakings, the situation changes where one business sets up a division to funnel to it

all the business it is capable of handling. CFL makes CFPX schedule its shipments to coincide with CFL line hauling times. CFL coordinates CFPX's sales activities so that both companies can present a united front to actual and potential customers. In short, CFL created CFPX to buttress its line haul operations between provinces. In such a situation only one undertaking exists. Such an undertaking can only be wholly federal in our respectful opinion.

Even if we are wrong about the indivisibility of CFL and CFPX and they can be seen as two undertakings, the operational integration between CFPX and CFL would surely result in a finding under the Northern Telecom Limited, supra tests that CFPX is an essential, integral or vital element of CFL's core federal operations. It seems to us that no matter how one looks at this constitutional question, CFPX is a federal work, undertaking or business within the meaning of section 4 of the Canada Labour Code and we so find.

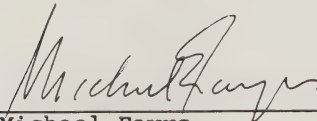
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chairman



Calvin Davis
Member



Michael Eayrs
Member

ISSUED at Ottawa this 16th day of July, 1990.

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Summary

COMMUNICATIONS AND ELECTRICAL WORKERS OF CANADA, APPLICANT, AND THE ISLAND TELEPHONE COMPANY LIMITED, EMPLOYER. APPLICATION FOR CERTIFICATION, SECTION 24 OF THE CANADA LABOUR CODE (PART I - INDUSTRIAL RELATIONS). GRANTED

Board File: 555-3029

Decision No.: 811

This case concerns an application for certification for first line (supervisory and non-supervisory) managers employed at Island Telephone Company Limited, P.E.I.

The company opposed the application on the grounds that it needed to have a basic management cadre in order to be able to effectively operate and attend to the administration of collective agreements with respect to supervised employees. It was its contention that these managers performed managerial duties and, consequently, were not employees within the meaning of the Code. In addition, it expressed concern over the potential conflict of loyalties with the same union representing these managers and the supervised employees.

On consideration of the written and oral evidence, the Board found that persons in the proposed unit did not perform management functions as key employment relations decisions rested with higher levels of management. Consequently, it determined that a unit comprised of all level I managers at Island Tel is appropriate for collective bargaining. Personnel assistants were excluded on grounds of confidentiality in matters of industrial relations.

The Board agreed with the company's position on the point of potential conflict of loyalties in the event the same union local represents both the supervisors and the supervised employees. As a consequence, it made the granting of the application conditional upon the creation of a new local for the proposed unit.

Ce document n'est pas officiel. Les motifs de décisions seulement peuvent être utilisés aux fins légales.

Résumé

LE SYNDICAT DES TRAVAILLEURS ET TRAVAILLEUSES EN COMMUNICATION ET EN ÉLECTRICITÉ DU CANADA, REQUÉRANT, ET ISLAND TELEPHONE COMPANY LIMITED, EMPLOYEUR. DEMANDE EN ACCRÉDITATION EN VERTU DE L'ARTICLE 24 DU CODE CANADIEN DU TRAVAIL (PARTIE I - RELATIONS INDUSTRIELLES). AGRÉÉE

Dossier du Conseil: 555-3029

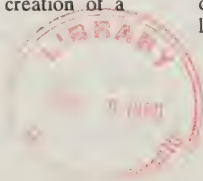
Décision n° 811

Les présents motifs portent sur une demande d'accréditation à l'égard des cadres subalternes (surveillants et non surveillants) à l'emploi de la compagnie Island Telephone Company Limited, à l'Île-du-Prince-Édouard.

La compagnie s'oppose à la demande parce qu'elle estime avoir besoin d'une équipe minimale de gestion pour pouvoir fonctionner de façon efficace et s'occuper de l'application des conventions collectives régissant les employés supervisés. Elle prétend que les gestionnaires en question occupent des postes de direction et que, par conséquent, ils ne sont pas des employés au sens du Code. En outre, elle s'inquiète de la possibilité de conflit de loyauté si le même syndicat représentait les gestionnaires et les employés supervisés.

En examinant la preuve écrite et orale, le Conseil a jugé que les personnes membres de l'unité proposée n'occupaient pas des postes de direction, puisque la responsabilité des décisions importantes concernant les relations du travail incombaient aux niveaux supérieurs. Par conséquent, il a décidé qu'une unité comprenant tous les gestionnaires de niveau I à l'emploi de Island Tel est habile à négocier collectivement. Les adjoints en personnel sont exclus en raison des fonctions confidentielles qu'ils exercent en matière de relations du travail.

Le Conseil accepte la position de l'employeur selon laquelle il pourrait y avoir conflit de loyauté si la même section locale représentait les surveillants et les personnes qu'ils supervisent. Par conséquent, l'acceptation de la demande demeure liée à la création d'une nouvelle section locale visant l'unité proposée.



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Reasons for decision

Communications and
Electrical Workers of Canada,

applicant,

and

Island Telephone
Company Limited

employer.

Board File: 555-3029

The Board was composed of Hugh R. Jamieson, Vice-Chairman, and Evelyn Bourassa and François Bastien, Members.

Appearances

Mr. Ronald Pink, accompanied by Ms. Carol T. Reardon and by Mr. William A. Parsons, for the Communications and Electrical Workers of Canada;

Mr. David H. Jenkins, Q.C., and Mr. Keith Boswell, accompanied by Mr. Ronald L. Waite, for the Island Telephone Company Limited.

These reasons for decision were written by François Bastien, Member.

I

This case is an application for certification as bargaining agent made pursuant to section 24 of the Code concerning the Communications and Electrical Workers of Canada, Local 401, applicant, and the Island Telephone Company Limited, Charlottetown, P.E.I., employer. The

proposed bargaining unit, as revised from the original application, is as follows:

*"A unit of employees comprising all Level 1
managers of Island Telephone, Prince Edward
Island, CANADA."*

In its reply, the employer claimed that the subject application had been made in respect of persons who are not "employees" within the meaning of the Canada Labour Code, since all persons for whom certification is sought exercise management functions and/or work in confidential capacities in matters relating to labour relations. In addition, it argued that such a bargaining unit would not be appropriate for collective bargaining because:

- a) there is no community of interest among level one managers as some of them do not perform any supervisory functions;
- b) those employees would be in continual conflict of interest because their managerial and disciplinary duties as managers would go against their duties as members of the same local of the same union;
- c) no such unit has ever been certified by the Board in the telecommunications industry;
- d) special circumstances apply to various individuals and/or groups of level I managers so that they should be excluded in any event.

On this last point, the employer has stressed that, should the application be granted, a number of specific classifications should not be included in the unit for a variety of reasons. The list of requested level I employee exclusions comprised personnel assistants, four "managers" located at the employer's Summerside office, staff assistant, acting level I "managers", and some twelve "managers" working in the sales and business office departments.

The applicant union responded by submitting that level I managers of the company are employees within the meaning of the Code as they do not exercise effective control over those employees whom they supervise, nor they participate in the policy-making process in a decision-making capacity or get regularly involved in confidential matters relating to industrial relations. It contended as well that a single supervisor unit is an applicable unit in this case because of the identity of working and employment conditions and the degree of interchangeability and frequent interaction between level I managers.

The Board held a hearing at Charlottetown on May 15, 16 and 17, 1990.

II

The definitional requirements to be satisfied in the determination of employee status are contained in subsection 3(1) of the Code:

" 'employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."

The first task of the Board in the instant case is therefore to ascertain, based on the evidence before it, the extent to which level I managers at Island Telephone Company Limited a) perform management functions; and/or b) are employed in a confidential capacity in matters relating to industrial relations.

The path for determining those matters is a particularly well-beaten one. There exists a wealth of jurisprudence at all jurisdictional levels that profiles the broad principles involved in a determination of this sort, as well as the practical instruments and tests used in the process. It is to these that the Board would now like to turn. They constitute the necessary backdrop for the interpretation and application of the concepts of employee, management functions, and exclusions within the meaning of the Code.

What are indeed those broad industrial relations principles and values embodied in the innumerable decisions rendered and precedents established by various labour boards and tribunals in Canada with regard to the issues at hand? For the sake of brevity, and allowing for the fact that the parties have great familiarity with them, they may be captured and summarized in the following assertions:

- a) Employees' right to join a union is accorded fundamental protection under the Code. It is the cornerstone of our system of industrial relations as stated in the Preamble to Part I of the Code. This commitment expressed itself internationally through the ratification by Canada of Convention No. 87 of the International Labour Organization concerning freedom of association and protection of the right to organize. On this point, see Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240), which also provides a detailed account of the legislative and case law developments surrounding the evolution and extension of that right to the needs of supervisors and professionals. See also Atomic Energy of Canada Limited (1978), 33 di 415; and [1979] 1 Can LRBR 252 (CLRB no. 156).
- b) The grounds on which the exercise of that fundamental right may be constrained or curtailed are very narrowly defined and interpreted, namely the avoidance of possible conflict of interest for employees caught between adversarial pressures inherent to the collective bargaining relationship. Hence the two elements of the Code definition referred to earlier, i.e. the management and confidential capacity exclusions. The Board has reaffirmed on countless occasions its belief that a person is entitled to enjoy the freedom of association as a matter of right, and that only under very strictly and well-defined conditions, should it be denied (see Cominco Ltd., supra; Vancouver Wharves Ltd. (1974), 5 di 30, at page 53;

[1975] 1 Can LRBR 162, at page 167; and 74 CLLC 16,118, at page 966 (CLRB no. 19); and Canada Post Corporation (1989), 90 CLLC 16,007 (CLRB no. 767).

- c) Membership in a trade union is not co-extensive with lesser corporate loyalty, nor is it per se indicative of a conflict of interest situation vis-à-vis professional standards and integrity. Referring to Canadian Press (1950), 52 CLLC 16,615 (CLRB), in which the employer argued fear of pro-union bias in the national news with the unionization of its editorial staff, the Board in British Columbia Telephone Company (1979), 38 di 145 (CLRB no. 221), at page 186, underlined the more complex climate within which board decisions must be made and collective bargaining rights exercised given that the supervisory and professional employees' industrial forerunners no longer provide the model for supervisory authority and managerial functions. In Cominco Ltd., supra; Canada Post Corporation, supra; Vancouver Wharves Ltd., supra, the Board elaborated on the factors at play in shaping a different environment and its attendant consequences on the definition of management and employee rights.
- d) Management is a generic concept and "its precise ambit is a question of fact or opinion for the Board rather than a question of law." This judgment of the Federal Court of Appeal in Bank of Nova Scotia v. Canada Labour Relations Board, [1978] 2 F.C. 807, at page 813; (1978), 21 N.R. 1, at page 7; and 78 CLLC 14,145, at page 128, sets

out clearly the broad terms under which the Board has responsibility to give it precise meaning and content. By implication, it refers to the need it has to treat the concept in its most dynamic aspects, i.e. as the embodiment of ever-changing corporate structures and processes, work practices, technologies and, ultimately, social values.

All the Board's decisions previously cited reflect this understanding of its specific role in matters of managerial exclusions. The net result has been a clear trend, replicated by provincial labour legislations, to extend bargaining rights to first echelons of management.

Flowing from these principles is a set of key interpretive rules and parameters evolved by this Board and other jurisdictions to delineate with some precision the boundaries of the managerial and confidential exclusion territory. Again, for the sake of brevity, they can be put in the form of the following propositions:

- a) There exists a hierarchy of management functions that acts as a useful criterion in the determination of employee or management status. From the multiplicity of functions involved in the act of management, such as budget preparation, corporate policy-making, work planning and organization, hiring and firing, performance appraisal, promotion or imposition of disciplinary sanctions, etc., some are definitively more important than others from an industrial relations

perspective because they affect, or at least have the potential to do so, the basic career or job interests of the people they supervise or manage. This point has been made repeatedly by the Board (see Vancouver Wharves Ltd. *supra*; British Columbia Telephone Company, *supra*, which also provides a detailed listing of its previous decisions on the definition and exclusion of management functions at page 155; Cominco Ltd., *supra*; and Canada Post Corporation, *supra*), but nowhere more clearly so than in Bank of Nova Scotia, (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRb no. 91), where it stated:

"The basis of the exclusion of certain 'management' persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. This avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment conditions of fellow employees. It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g. the authority to dismiss or discipline fellow employees). ..."

(page 457; 134; and 536)

In other words, the closer a function is to employment relations issues the greater the management content deemed present in that function.

- b) Decision-making authority, not complex or expert knowledge, constitutes a proper basis for management exclusion. This is, in fact, a corollary of the previous observation. Proximity to employment relations is but one axis of the definition of management function; real decision-

making is the other. To be involved in important decisions or in key areas of a company's operations through the provision of expert advice or technical knowledge is one thing; to use it to actual employment relations effect is another. In British Columbia Telephone Company (1976), 20 di 239; [1976] 1 Can LRBR 273; and 76 CLLC 16,015 (CLRBR no. 58), the Board has commented extensively on the nature of this critical difference noting that, under the Code, "the performance of functions of a highly technical or professional nature is not a bar to the inclusion in a bargaining unit" (pages 265; 281; and 467). In that same decision, it took exception to the proposition that the power to effectively recommend is generally equivalent to the power to decide. The existence in most good-sized organizations, particularly in the service industries, of a large core of knowledge workers and their clear impact on the overall quality of corporate decision-making does not detract from the obligation they have to meet a stringent decision-making test before they can be excluded on management grounds. Similarly, in Atomic Energy of Canada, supra, speaking of the role of foremen, it observed that their input into important decisions cannot be described as "finally determinative."

- c) No individual or single criterion will in and of itself be determinative of the employee status of a particular stratum of "management" personnel. Determination of employee status will rest in the end in the consideration of all factors discussed earlier and on the particular organizational

configuration in which they find themselves. Conversely, no specific attribute, such as the exercise of supervisory duties, will automatically bar supervisors from forming or joining a union as subsection 27(5) of the Code makes clear.

- d) Confidential capacity in matters relating to industrial relations is strictly defined by this Board. Following the enunciation of basic criteria several years ago by the Supreme Court of Canada when considering the unqualified words "employed in a confidential capacity in British Columbia legislation" (Labour Relations Board for B.C. et al v. Canada Safeway Limited (1953), 53 CLLC 15,058, at page 173), a three-fold test has evolved to determine confidentiality in such matters. As mentioned in Canadian Imperial Bank of Commerce (Victory Square Branch) (1977), 25 di 355, at page 362; [1978] 1 Can LRBR 132, at page 137; and 78 CLLC 16,120, at page 317 (CLRB no. 104), "[t]his threefold test is a consensus of labour boards in Canada." The test and its rationale were stated in Bank of Nova Scotia, supra, as follows:

"The denial of collective bargaining rights to persons employed in a confidential capacity in matters relating to industrial relations is also based on a conflict of interests rationale. The inclusion of that person in a unit represented by a union might give the union access to matters the employer wishes to hold close in its dealings with the union. These include bargaining, grievance and arbitration strategy. To avoid that conflict and to assure the employer the undivided confidence of certain employees these persons are denied the right to be represented by a union even if they wish to be represented. However, this exclusion is narrowly interpreted to avoid circumstances where the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of

persons enjoy the freedoms and rights conferred by Part V.

To this end this Board and other Boards have developed a three-fold test for the confidential exclusion. The confidential matters must be in relation to industrial relations, not general industrial secrets such as product formulae (e.g. Calona Wines Ltd., [1974] 1 Canadian LRBR 471, headnote only (BCLRB decision 90/74)). This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial (e.g. Exhibit E-21). It does not include personal history of family information that is available from other sources or persons. The second test is that the disclosure of that information would adversely affect the employer. Finally, the person must be involved with this information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can gain access to it. (See Greyhound Lines of Canada Ltd. (1974), 4 di 22, and Hayes Trucks Ltd., [1974] 1 Can LRBR 84.)"

(pages 460; 136; and 537)

This means that in matters of exclusions on grounds of confidentiality, the task of the Board is a very straightforward one. It must weigh the evidence before it and, then, apply the test rigorously.

III

The Island Telephone Company Limited ("Island Tel") is a federally regulated public utility and the principal provider of telephone and other telecommunication services in the province of Prince Edward Island. Service is provided through a system of approximately 60 000 main telephone lines. Its main office is in Charlottetown, but it has a second office in Summerside.

Maritime Telegraph and Telephone Company, Limited ("MT&T"), a public telephone utility serving Nova

Scotia, owns close to 52% of Island Tel's outstanding common stock. In turn, Bell Canada Enterprises Inc. owns approximately 33% of the outstanding common stock of MT&T.

Island Tel employs approximately 354 employees and, of this number, approximately 275 are included in three bargaining units. The applicant union is currently the bargaining agent for the company's telephone operators and telephone plant workers. Two collective agreements covering both groups are presently in effect and expire December 28, 1991. The Telephone Employees Union (TEU) represents the company's clerical staff with its present contract expiring on December 29 of this year.

Organizationally, management at Island Tel is deployed in a four-tier structure.

- Level IV includes the Vice-President who reports to the President and Chief Executive Officer.
- Level III is formed of the four general managers responsible for network, residential, business and corporate services.
- Level II comprises seven supervisors and four managers who oversee a variety of line and staff functions.
- Level I includes all the supervisory and non-supervisory personnel whom the applicant union seeks to represent. The proposed unit is composed of some 58 persons, of which 32 employees perform supervisory function and 26 who do not. Their responsibilities vary from construction and installation to

technical operations and expertise to sales and personnel services.

Lest there be a misconception regarding the relative simplicity of this structure, it needs to be said that the company depends on its parent, Maritime Telegraph and Telephone Company Limited (MT&T), for the provision of certain management, engineering, treasury, computer, accounting, and other operations support services.

From this sketchy business and organizational profile, let us now concentrate on the abundant written and oral evidence before us regarding the company's individual circumstances pertaining to managerial and confidential capacity exclusions. To what extent are level I managers at Island Tel involved in the performance of functions typically associated with management? Similarly, is their input and involvement in industrial relations matters such that they would put themselves and their employer at a serious conflict-of-interest risk if they were to become unionized? What is the evidence on each of the key responsibilities and functions involved in such a determination? To this task we now turn.

a) Hiring

Level I managers' role in the hiring process is typically to review the list of qualified candidates provided by the human resources group, to design and conduct an interview process, with assistance from the human resources group, at the end of which the original list would be pared down to three or four candidates. These would be later interviewed by the level II manager. Depending on

individual circumstances or different management styles, level I managers may take part in the tier-two interview. However, notwithstanding the teamwork dimension of the process, the testimonies of Messrs Acorn and Taylor, respectively General Manager, Residential Services, and Trunk and Switching Supervisor, make it abundantly clear that the ultimate decision for hiring rests at their level and not level I. Indeed, Mr. Taylor admitted to one instance in the recent past where he had to go against a recommendation to hire from level I because, in his judgement, the conclusion had been reached outside the approved rating system. Unsurprisingly, level I managers viewed in slightly differing tones the amount of influence they felt they exercised over the process, but none of them claimed that ultimate authority for the decision was vested in them.

b) Transfers and promotions

The company pursues an active management development policy through acting assignments, secondments, transfers and promotions. The evidence as to the role played by level I managers in the implementation of that policy is clear. Those persons' judgement and knowledge of the business are very much relied upon for identifying management talent as well as development opportunities at the initial point in the process. However, their role does not involve actually making the decision in those matters. The process governing appointments to management positions, the posting of which is commonly known as the "green

sheets," is a formalized one always involving a recommendation from a level II manager and a decision made at level III and IV.

As for transfers, provisions 6:01 and 6:02 of General Circular no. 206.9 on individual salary planning and position changes give a clear indication of the level of authority involved, at least as far as a move to a lower class position is concerned. Thus, "when an employee, who is performing satisfactorily on his present job, is transferred to a position in a lower class for any of the following reasons: a) the development of the employee, b) organization changes which eliminate or alter the employee's job, c) as a result of job evaluation, he shall be eligible for salary increases in accordance with his former salary class subject to approval by the General Manager" (emphasis added). The Board has no indication of any decision-making authority for level I managers in situations involving other types of transfers.

c) Performance management system

Level I managers evaluate and assess the job performance of subordinate employees on a quarterly and yearly basis. Annual reports are reviewed by level II managers for consistency, comments and fairness of process. As noted above, these appraisals provide managers with an opportunity to identify candidates with potential for development and promotion into management category. Managers at that level do have a say therefore on "who gets

in the room" as general manager Acorn put it. However, he recognized when cross-examined by the applicant counsel that level I managers do not partake in the selection of potential peers. Decision for promotion clearly resides above level I.

d) Administration of discipline

According to the company's General Circular on the subject matter dated August 1980, level I managers have authority to discipline subordinate employees in the form of an oral or written warning and to suspend a subordinate employee from work for a period of up to three days. In the case of written warnings, the evidence before the Board suggests a slightly more complicated process in terms of involvement of higher management levels. Ms. Sandy MacDonald testified that in one such instance, her level I manager, Mrs. Cameron, did sign the letter of warning but that, concurrently, she joined a meeting with the individual in question to discuss the matter. The other instance involved Mrs. D.E. MacPhail, Sales Manager, who, as a level I manager, once issued a written warning to an employee whose work quality was deemed not to be up to the required standard. The procedure used was as follows. After discussing with the employee and trying to effect change, she made the decision to issue a written reprimand. She discussed it with her manager and conceded in cross-examination that this might have taken the form of a recommendation for approval or rejection by that manager. In any event, the letter got typed in another department but was signed by her, although a level II manager,

Mr. Meek sat in at the meeting with the individual. The important fact to keep in mind in weighing this evidence is that written reprimand is something seldom used at Island Tel (Mr. Acorn, General Manager, Residential Services recalled one case in the last three years) and, when it is, there is some degree of involvement on the part of level II managers. But in ordinary circumstances, level I managers' main responsibility remains to identify problems as they arise, provide first-hand information in cases where documentation is required, and to apply corrective measures.

Like written reprimands, dismissals at Island Tel are few and far between. Of the four or five cases referred to over the past few years at least two featured non-regular or temporary employees, i.e. a management trainee and another person employed under a special program to which particular rules applied. Relevant evidence relates to just one case where an employee was dismissed for drinking reasons. Mr. Alex Taylor, Supervisor, Trunk and Switching, testified that he made the decision on the basis of the facts collected by the level I manager concerned who also consulted with Corporate Services. Legal Counsel helped in the drafting of the dismissal letter signed by Mr. Taylor. In his testimony, Mr. Acorn described the role of first line managers in matters of dismissal as that of setting performance criteria, reporting on lack of performance and ultimately, making the recommendation to dismiss. In cross-examination, he did not disagree with the applicant counsel's

assertion that no one at level I had ever fired an employee.

e) Corporate Policy

According to the evidence, first level managers perform a rather limited role in the development of corporate policy. Typically it takes the form of an opportunity to discuss corporate plans and circulars from the perspective of what is missing. As such, managers provide valuable input and keep policies and plans closer to tangible work place issues. However, their role expresses itself in a predominantly reactive mode and, if they are said to initiate policies, it is clearly in the sense of their identifying in the course of performing their duties specific issues, the handling of which may culminate at a later stage in the development of specific policy instruments. The policies and procedures referred to in Mr. Swan's testimony are those contained in various administrative letters whose purpose is to provide guidance on how to perform a particular function. First level managers are party to the process of formulating policies but in a most incidental and ancillary manner, namely as part of a key feedback loop that provides the centre with valuable information on the likely relevance and consequences of the proposed policies. They deal primarily with 'how' questions not, 'what' ones.

f) Financial authorizations

General circular no. 101.2 sets out clearly the financial authority granted each level of management at the company for a wide range of

transactions, undertakings agreements and contracts. Level I managers do not figure prominently in that document and their authority is limited to financially negligible items, i.e. in the \$100 to \$1,000 range, such as order approval for stock or non-stock items of tools and work equipment within the limits of the approved estimate and/or budget, sending back to a supplier for repair, employee expenses on statements, and payment for vehicle repair and maintenance. There is nothing in what the Board heard on the budget planning and control activities of level I managers that may suggest financial authority beyond what the circular enunciates. In that regard, it is interesting to note that the distribution of that general circular, like all others on file, is limited to level II and above. The company downplayed the significance of it by stressing that all such documents are readily available to level I. However, its content, whose clear effect is to leave them out of a significant role in the area, would tend to indicate otherwise.

g) Labour Relations

Three aspects of the labour relations function are here examined from the perspective of the level of involvement of first line managers. They are of material importance in the determination of a potential situation of conflict of interest.

- (i) Contract administration and grievance procedure. Front line managers have a clear responsibility for the administration of collective agreements. This means the day-to-day application of the relevant provisions of the agreements and matters of interpretation arising in a variety of operational contexts. As pointed out, this role has a direct impact on the quality of the bargaining relationship and morale in the work place. An extension of that role is the participation of level I managers at the first level of the grievance procedure, a point uncontested by the applicant union.

Evidence was also adduced to the effect that some first level managers had taken an active part in the arbitration process through appearance at the proceedings and assistance in the development of a company position on the points in dispute. The importance of their role in these two critical areas was strongly emphasized. But a conclusion that the exercise of this role, however important, puts them in a conflict-of-interest position does not follow. In both cases they are held to standards that have little to do with collective bargaining, but a lot with professional competence and moral integrity.

- (ii) Collective bargaining. The managers concerned do not participate directly in labour negotiations as a matter of regular practice.

There have been about three occasions over the last 15 years where one of them have sat at the bargaining table. The most recent case happened in 1988 when Mr. R.A. Jenkins was seconded to the employer's bargaining team by virtue of his expertise in safety and health. Corporate Services General Manager, Mr. R.L. Waite, explained to the Board that the practice has now evolved to build in-house expertise in labour contract negotiations as opposed to the use of an outside labour lawyer as was the case until five years ago. His testimony made it clear, however, that such an involvement is primarily in response to subject matter expertise and management development needs. Strategy formulation and implementation decisions in contract negotiations matters are no doubt made elsewhere. The testimonies of these managers make it clear that their input and contribution to the process is in the form of operational expertise and sensitivity to bargaining issues not to their actual management and, ultimately, resolution.

- (iii) Confidentiality. This term is used in the strict interpretation referred to earlier, i.e. defined in an industrial relations sense and pertaining to conditions or circumstances where it is actually used, or have the potential to be used to bargaining advantage or result. This in effect leaves out the performance of functions involving access to

confidential records, centralized files, sensitive dealings with individuals, etc. With the exception of personnel assistants to whom we will return later, the Board has found no evidence that employees of the proposed unit have access to any industrial relations type of information, as understood by the Board, in the normal and regular course of their duties.

Before we leave this area, a last remark on the existence and function of the Labour-Management Committee. This is a joint body formed of an equal number of employer and union representatives with a rotating chair. It operates on a consensus-building and collegial mode and deals strictly with non-bargainable issues, such as safety and health and environment. Level I managers sit on the committee as management representatives along with senior managers. Its dedicated focus on broad, non-contract work place issues thus rules out the possibility of conflict of interest for level I managers serving on it.

Overall, the reasons put forward by the company in support of its position can be summarized as the arguing of a three-fold case: a) function, b) location, and c) corporate requirements. The Board intends to address each of them in turn on the basis of the evidence before us.

- a) Function. As seen above, the Board has carefully reviewed the individual circumstances and

operational contexts within which level I managers are deemed to be exercising typical management functions. There were two overriding themes that emerged from the testimonies and arguments heard at the proceedings: (i) the crucial importance of first line managers in the effective running of an organization such as Island Tel; (ii) the exercise of independent judgement by these managers in a context where increased responsibilities are devolved to them. However, these considerations are not pertinent to the Board's task of determining employee status, not to mention the fact that they are beyond dispute. The extensive jurisprudence cited earlier leaves no doubt whatsoever that the exercise of independent judgement is foreign to labour boards consideration of management functions (specifically, Vancouver Wharves Ltd., supra, pages 55; 169; and 968).

The real question again is whether the function-by-function analysis of the evidence presented earlier yield any nuggets of real decision-making authority for level I managers in essential managerial matters? The Board's judgement is that it does not. There is a great deal of evidence to the effect that these persons play a very active and important role in a large number of management processes but certainly not in a manner that would be clearly determinative of these processes or their results. As a general statement on the degree of management functions present in the duties carried out by first line managers at Island Tel, there is little that one would see fit to

subtract from the following description of the duties of similar officers at B.C. Tel.

"... While it is true that many persons in the proposed bargaining unit devote much of their time to the performance of supervisory functions, the evidence does not disclose that they perform management functions such as would warrant a finding that they are not 'employees'. It is clear that these first level supervisors have little or no autonomous input in the preparation of the budget, in corporate policy making, or in the making of crucial decisions with regard to the organization of the enterprise or appropriate staffing levels. Although they represent the employer vis-à-vis the employees they supervise, it is clear that they play little or no role in representing the employer in collective bargaining or in contract administration. They do play a somewhat more important role in some areas of the personnel function but, even then, their role and authority is strictly circumscribed in the making of all 'key' decisions such as hiring, firing, promoting or the imposition of major or disciplinary sanctions. They are involved in organizing, planning and evaluating the work of the employees reporting to them, but it is worth noting that 'classified' employees such as dispatchers, also have a role in organizing and assigning work and that the evaluation process normally involves the participation by way of review or approval of various levels of management. They have some authority to authorize time off or overtime, but this authority must be exercised in accordance with the provisions of collective agreement or relevant company policies or regulations which leave them relatively little discretion. Much has been made of their alleged power to suspend or fire ordinary employees. We note however that most first level supervisors have never made such a decision and that, in the few instances where this did occur, the intervention of higher levels of management or of the Personnel and Industrial Relations Department turned any such decision into a 'group decision'. In this context, any 'decision' by a first level supervisor is little more than a 'recommendation' and later events will determine whether that recommendation will be effective or not. It is true that first level supervisors do exercise more authority as regards probationary employees, but even there this authority is not used very often and, where it is used, it is within the scope of a program for training and

evaluating probationary employees which ensures that the discretion of individual first level supervisors will be exercised within strictly defined parameters".

(British Columbia Telephone Company (1977), 33 di 362; [1977] 2 Can LRBR 385; and 77 CLLC 16,107, pages 377-378; 397-398; and 651)

- b) Location. It is the company's contention that the four level I managers located at Summerside are personnel who exercise managerial responsibility over the company's operations in the area and truly act, and are perceived as such by the community, as its representatives. It claims their situation is akin to isolated-area managers in British Colombia Telephone Company (98), supra. This decision stated:

"... The evidence discloses that first level supervisors working in isolated areas exercise authority and enjoy a measure of autonomy which distinguishes them quite markedly from their colleagues in the Lower Mainland. In these locations, the operations of B.C. Tel. are necessarily fairly decentralized so that it is neither practical nor possible to maintain a close control over the activities of first level supervisors. Most of the time, they report to level II or III managers working in fairly distant locations whose functions are geared more to representing B.C. Tel. in the community than to closely supervising and controlling the activities of their subordinates. In this context, the first level supervisor is more than just a supervisor. He becomes a manager and the key representative of the employer vis-à-vis the employees he supervises and vis-à-vis suppliers and customers of B.C. Tel. Mr. Jewell, first level Construction Supervisor at Williams Lake, is a typical example of this phenomenon. Although his job description is fairly similar to that of his colleagues on the Lower Mainland, he does in fact perform management functions. Inasmuch as his duties and responsibilities and the manner in which they are exercised appear to be typical of first level supervisors employed outside the Lower Mainland, it would justify a finding that these persons are not 'employees' within the meaning of section 107(1) of the Canada Labour Code (Part V - Industrial Relations)."

(pages 378-379; 398 and 651-652)

While the Board recognizes that the mix of functions performed by Summerside managers is probably more varied and diversified than is the case for their colleagues in the main office, namely with respect to their representational activities, the level and the frequency with which these are performed do not warrant distinct treatment. The geographical and organizational isolation referred to in the B.C. Tel decision is a very poor fit in the case of Summerside. Contacts, if not daily, are most frequent and ongoing with higher levels from the main office to the point where no important decisions will be made independently; as for representational duties, they are essentially confined to sporadic speaking engagements before the local Chamber of Commerce.

- c) Corporate requirements. The company emphasized throughout the hearing its concern over a perceived conflict of loyalties between unionized managers and their supervised unionized employees. Over and over, it stressed the company's need to have a basic management cadre in order to be able to effectively run the company and attend to the administration of collective agreements with supervised employees. These concerns are all the greater, it argued, because its small size does not permit any management depth, and that the unionization of its first level management will result in a shift of the balance of power to the union.

The Board fully appreciates that such a unionization would not be for all parties involved adjustment-free. Old ways will have to be reviewed and a new set of relationships defined. But after carefully considering the particulars of the company's situation and having heard a number of remarks from some of its senior officers, it is the Board's view that those fears are rooted in a misconception of what a supervisory personnel union represents and its place within the authority structure of the company. The argument of undivided loyalty, often heard during the hearing, assumes that the interests of its level I managers, once unionized, will be automatically directed against those of the company and, conversely, will be lumped with those of supervised employees.

Experience gained by various labour boards through years of certifying units that include supervisory personnel suggests otherwise. Dire predictions about the adverse effect of unionization of supervisors have invariably failed to materialize, with the result noted earlier that the right to organize has been extended gradually to classes of employees traditionally regarded as management. Most employees, particularly the highly skilled and talented individuals operating in today's dynamic environment, cannot fail but see themselves confronted to numerous competing loyalties: personal and familial, careers, community and cultural interests, etc.; the fact that a majority within a group choose freely to join a union to further their community of interest merely adds to

the list. Such a decision cannot be construed as spelling the demise of corporate loyalty. To take a different view would amount to negate the important industrial relations objectives set out in the Preamble of the Code and question the legitimacy and success of our system of industrial relations.

If one accepts the view that the corporate entity itself is the result of a large variety of different interests made congruent by the pursuit of agreed upon objectives and goals, then the issues of size and shift in the balance of power raised by the company do not appear as ominous. Level I managers will not suddenly abandon, by the mere virtue of being unionized, the furtherance of corporate goals; these are far too critical to the achievement of career ones. The relative position of first line managers in the corporate hierarchy also sets them apart from the subordinate employees. Simply put, the Board does not believe that the addition of one bargaining unit, be that of its supervisory personnel, put the company at risk with regard to the administration of its labour relations function.

V

Having determined that level I managers at Island Tel are employees within the meaning of the Code and that their unionization would not constitute an insurmountable obstacle to the administration of its labour relations, the Board now turns to the

appropriateness of the proposed unit and the question of exclusions.

The Board accepts that there is a strong community of interest between the supervisory and non-supervisory components of first level managers. Overall compensation and employment conditions, the variety and complexity of the tasks assigned, the similarity of career paths together with the fact that these employees are basically treated as such by senior levels of management (e.i. meeting, information distribution, and management development practices) are all factors that support our conclusion. The fact that the company's policy and practice is clearly to provide its level I managers with numerous developmental opportunities, be they secondments or project management undertakings, the net result of which is greater interchangeability among managers, would only tend to blur even more the distinction between the two components.

As regards exclusions, the Board has given the matter a long and hard look. We discussed earlier the situation at Summerside and the reasons why we do not consider them to be performing substantially different tasks than their main office counterparts. The same arguments hold with regard to the request that they be excluded on the basis of confidentiality.

Another position identified by the company as warranting exclusion is that of staff assistant, Corporate Services. This person, it is alleged, has confidential access to financial and other budgetary information of the company including labour relations and negotiations.

The evidence shows that the type of information accessed or produced by that person is projected management staff and salary increases. Salary increases involved are up to level II and actual salary figures are not accessible.

What this suggests is that the staff assistant is sufficiently removed from the actual use of this information in a direct collective bargaining context as not to pose any real possibility of conflict of interest. The preparation of financial forecasts is certainly an important input to the development of a bargaining position but no more so than the views of first line managers on the shortcomings and difficulties of the current contract. In all cases, the pertinent point is that none of these persons' basic duties relate to the direct formulation and implementation of the company's strategies in industrial relations matters. Consequently, they fail to meet the stringent three-fold test referred to earlier.

The company's case is much stronger with regard to the positions of personnel assistants. The applicant's counsel agreed that one of them, D.B. MacKenzie, should be excluded on the basis of his being a member of the negotiating committee. The Board reaches the same conclusion but determines as well that the two other assistants should be excluded. While their involvement in collective bargaining matters may not be as sustained and intense as the other, the Board agrees with the company's position that their role is essential in the smooth functioning of its labour relations administration. This function needs to rely on some

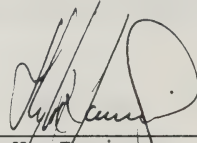
broader support and, given the relatively small size of the company, the other personnel assistants certainly fulfil that role. Consequently, they should be excluded from the proposed unit.

A last but important point on the question of appropriateness. Right from the outset, the Board shared the company's reservation about having the same local of the same union to represent both the level I managers and subordinate employees. Concern that this constitutes a real and serious situation of potential conflict of interest is legitimate. At the time of the hearing, the applicant union was slowly coming to that view when it indicated in its written reply to the company's that it was willing to create a new local for the representation of the supervisory bargaining unit if this was deemed necessary by the Board.

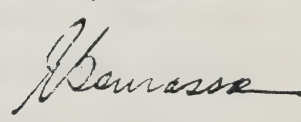
Considering all of the foregoing reasons, it is therefore the unanimous decision of the Board to grant the application provided the applicant union set up a new local to represent the proposed unit. This unit is described as follows:

All Level I Managers of the Island Telephone Company Limited, excluding the three personnel assistants.

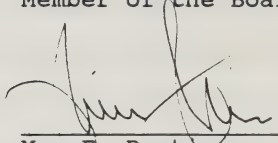
A certification order reflecting this decision has already been issued to the applicant, who has since complied with the order to create a new local.



Mr. H. Jamieson
Vice-Chairman



Mrs. E. Bourassa
Member of the Board



Mr. F. Bastien
Member of the Board

DATED at Ottawa this 17th day of July, 1990.

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Summary

TEAMSTERS, BREWERY, SOFT DRINK AND
MISCELLANEOUS WORKERS' UNION, LOCAL
1999, APPLICANT, AND TECHNAIR
AVIATION LTÉE, EMPLOYER, AND
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
MIS-EN-CAUSE.

Board File: 555-3010

Decision no.: 812

The investigation conducted by a
Board's officer in the
certification application filed by
the applicant union has revealed
irregularities and unlawful
technicalities in the membership
evidence submitted by the latter
to establish its
representativeness.

Having been informed of this
situation, the applicant then
requested a withdrawal. Taking
into account the nature of the
irregularities, the Board refused
to allow the request for withdrawal
and rejected the application for
certification.

Ce document n'est pas officiel.
Seuls les motifs de décision
peuvent être utilisés à des fins
juridiques.

Résumé de décision

UNION DES ROUTIERS, BRASSERIES,
LIQUEURS DOUCES ET OUVRIERS DE
DIVERSES INDUSTRIES - TEAMSTERS,
SECTION LOCALE 1999, REQUÉRANT, ET
TECHNAIR AVIATION LTÉE, EMPLOYEUR,
ET ASSOCIATION INTERNATIONALE DES
MACHINISTES ET DES TRAVAILLEURS DE
L'AÉROSPATIALE, MIS EN CAUSE.

Dossier du Conseil: 555-3010

N° de décision: 812

L'enquête effectuée par un agent
du Conseil à la suite du dépôt
d'une demande d'accréditation par
le syndicat requérant a révélé des
irrégularités et des illégalités
dans les preuves d'adhésion qu'il
avait soumises au Conseil afin
d'établir son caractère
représentatif.

Informé de cette situation, le
requérant a présenté une demande
de désistement. Compte tenu de la
nature des irrégularités
constatées, le Conseil a refusé de
faire droit à la demande de
désistement et a rejeté la demande
d'accréditation.



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Reasons for decision

Teamsters, Brewery, Soft Drink
and Miscellaneous Workers'
Union, Local 1999 of the
International Brotherhood of
Teamsters,

applicant,

and

Technair Aviation Ltée,

employer,

International Association of
Machinists and Aerospace
Workers,

mis-en-cause.

Board File: 555-3010

The Board was composed of Ms. Louise Doyon, Vice-Chair, as well as Ms. Ginette Gosselin and Mr. J.-Jacques Alary, Members.

Appearances:

Mr. Gilles Laliberté, for the Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999 of the International Brotherhood of Teamsters;

Mr. Guy Tremblay, for Technair Aviation Ltée.; and

Mr. Charles Schmidt, for the International Association of Machinists and Aerospace Workers.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

These reasons are further to an interim decision of April 20, 1990, in which the Board dismissed the applicant union's application for certification. The Board told the parties, when it issued the interim decision, that they would receive the reasons for its decision later. This document comprises these reasons.

I

The proceedings

On September 28, 1989, the Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999 of the International Brotherhood of Teamsters (the applicant), filed with the Board an application for certification to represent the following group of employees employed by Technair Aviation Ltée:

"All employees within the meaning of the Canada Labour Code working as mechanics, electricians, cleaners, storemen, excluding maintenance foremen/inspectors, the head of purchasing and of storemen and those above."

(translation)

On December 21, 1989, the International Association of Machinists and Aerospace Workers (the mis-en-cause) made an application for certification to represent essentially the same group of employees. As of this date, the Board had still not disposed of the applicant's application.

Following the filing of these two applications for certification, one of the Board's senior labour relations officers conducted the usual investigation in these two files. During this investigation, he examined not only the questions relating to the description of the bargaining unit and the employees affected, but also all aspects pertaining to the representative character of each of the two associations.

Upon completion of his investigation, the officer sent the parties a copy of his report on March 9, 1990. At page 8 of this report, he states that he received from the mis-en-cause information concerning certain irregularities that

the applicant allegedly committed during its organizing campaign and that appeared to cast doubt on the membership of certain persons in this union.

In his report, the officer states the following on this subject:

"The Association informed the Board that Teamsters Local 1999 had apparently committed irregularities and illegalities in its organizing campaign in preparation for filing its application on September 28, 1989 and asked the Board to conduct the necessary investigations and research in order to determine the admissibility of Local 1999's application.

Officer's note: A confidential investigation was conducted among the employees concerning the signing up of members by Teamsters Local 1999 and by the Association (IAM) and a confidential report was submitted to the Board."

(translation)

In the wake of this report, counsel for the applicant sent his written submissions to the Board on March 19, 1990. Counsel replied as follows to the allegations of irregularities or illegalities described in the report:

"2. In item 9 of your report, after noting the allegation by the International Association of Machinists that 'irregularities and illegalities' were committed by Teamsters Local 1999 in signing up members, you state that a confidential investigation was conducted among the employees concerning this allegation and that a confidential report was submitted to the Board.

Since the letter from counsel for the International Association of Machinists makes no specific allegation concerning these alleged illegalities and since the applicant union was not informed of the contents of the report that you apparently submitted to the Board concerning these memberships, we submit to you that the fundamental rules of natural justice and the objectives of the Canada Labour Code dictate that our client be able to examine this confidential report concerning it.

In support of this request, we submit that section 28 of the Board's Regulations does not totally prohibit disclosure because the Board can authorize the disclosure of a report where, in its opinion, this would further the attainment of the objectives of the Code.

In the instant case, to the extent that the Board would want to use this report to allegedly dismiss the applicant union's application, we submit that the applicant union has the right to examine the report in order to be able to file with the Board an appropriate reply.

This request is particularly justified because, in the present case, our client was informed that at least one employee deliberately claimed not to have signed a membership form for Local 1999 with the sole intent of leading the employer and the other employees to believe that she did not join the applicant union.

Our client wishes to call witnesses who were present when this employee signed the membership card who will be able to confirm the authenticity of her signature."

(translation)

Counsel added that, in any case, if the Board wanted to ensure that the unions in question possessed the representative character, it should hold a representation vote.

On March 21, 1990, the Board officer met with counsel for the applicant union and two of its representatives in order to inform them of the detailed results of his investigation concerning the representative character of their union.

During this meeting, it was agreed that the applicant union would send the Board its comments and submissions of each of these alleged irregularities or illegalities not later than April 3, 1990, regardless of the position that the union might eventually adopt concerning its application for certification. The Board confirmed this agreement in writing on March 22, 1990.

On April 3, 1990, the Board received a letter from counsel for Local 1999. This letter simply stated that the local wished to withdraw its application for certification.

Noting that this letter did not meet its expectations, the Board asked the applicant, on April 5, 1990, whether this letter in fact constituted all the submissions it intended to file in reply to the results of the investigation of which it had already been informed; if not, the Board would give it until April 12, 1990 to reply.

On April 12, 1990, the Board received the following reply from counsel for the union:

"We were very surprised to receive your letter of April 5, 1990 in which you ask us, despite the notice of withdrawal we sent you on April 4, 1990, to make submissions to you further to the meeting we had with Mr. Pierre Thivierge and his subsequent letter of March 22.

We consider in fact that the applicant union is free to withdraw an application it has filed with the Board, without having to obtain permission from the Board to do so. Subject to the foregoing and with the sole purpose of informing the Board of the reasons for its decision, the applicant union has instructed me to inform you that the alleged irregularities mentioned in Mr. Thivierge's letter, if they occurred, were committed without the knowledge of Local 1999 or its representatives.

As we told Mr. Thivierge at the March 21 meeting, the majority of membership cards were signed by employees, and not by Local 1999 organizers. Following the meeting with the Board officer, the representatives of Local 1999 tried, unsuccessfully, to trace the persons whom it is said obtained signatures on allegedly questionable cards, and since it was impossible to obtain sufficiently detailed answers to these inquiries, Local 1999 decided to withdraw its application without, however, in any way admitting that the application was not founded.

In fact, we submit that the alleged irregularities, if they were committed, are not sufficient to justify the dismissal of the application but would at most have warranted the Board's disregarding the memberships in question. If there were irregularities, we submit that the Board should nevertheless, if it feels that it must decide the merits of the application, order a representation vote as we have already suggested in our earlier correspondence.

I trust that you will find this explanation satisfactory."

(translation)

After examining and studying all the facts of the case, including the officer's report, and more particularly his confidential report concerning the applicant's representative character and the supporting documents, and after having received the applicant's submissions to that effect, the Board decided, on April 20, 1990, to dismiss Local 1999's application for certification rather than grant its request for withdrawal.

II

Reasons for decision

The nature and seriousness of the irregularities revealed by the Board's investigation are the basis for its decision of April 20, 1990. These reasons set forth the criteria adopted by the Board in interpreting and applying the legislative and regulatory provisions that are pertinent to the instant case. This case also raises another issue: whether a party has the right to withdraw a proceeding without the Board's consent. These reasons deal with that issue first.

1. The Board's power to deny a request to withdraw a proceeding

In its reply of April 12, 1990, the applicant claims that "the applicant union is free to withdraw an application that it has filed with the Board, without having to obtain the Board's permission to do so." This statement is unfounded.

On the contrary, the Code and the criteria established over the years in past Board decisions indicate that the Board has the power to deny a party the right to withdraw its

proceeding, whether it be an application for certification, a complaint or any other type of application made to the Board.

In Canada Post Corporation (1987), 70 di 1; and 16 CLRBR (NS) 310 (CLRB no. 628), after recalling that the discretionary power to grant or deny a request for withdrawal is a common practice not only of this Board but also of other labour relations boards in Canada, the Board said the following:

"Practice aside, however, we are of the view that the Board does possess the necessary legal discretion in this matter. The Board derives its powers to control its own procedure from sections 117, 118 and 121 of the Code."

(pages 22; and 332)

Later in the same decision, the Board added this:

"Thus, in general terms, so long as we are exercising an authority within the context of the Code, and in keeping with the rules of natural justice, and with a view to promoting harmonious labour relations for the public good as set out in the Preamble to the Code, we believe that the powers conferred on the Board are broad enough to determine whether it will grant a withdrawal."

(pages 23; and 333)

In this particular case, the Board denied the request for withdrawal, after determining that the reasons given in support of this request served neither the public interest nor the pursuit of sound labour relations.

Prior to this case, the Board had exercised this discretionary power in disposing of requests for withdrawal in certification proceedings. In Terminal Maritime Pointe-au-Pic (1984), 56 di 240 (CLRB no. 477), the Board denied

the applicant the right to withdraw a first application for certification for the following reasons:

"Under the circumstances, the employees and the objectives of the Code would be ill served if we were to allow the applicant union to withdraw its first application. It is a well-established practice recognized by the parties that withdrawal of a proceeding before the Board is not automatic. This must apply all the more in the case of an application for certification, since a party requesting permission to withdraw could negate the effect of section 31 of the Board's Regulations which reads:

'31. Where the Board has refused an application from a trade union for certification as the bargaining agent for a unit, the Board shall not thereafter receive another application from the trade union for certification in respect of the same or substantially the same unit until a period of six months has elapsed unless the Board, on the application of the trade union, abridges that period pursuant to paragraph 118(m) of the Code.'"

(page 243)

In Cape Breton Development Corporation (1977), 20 di 301; [1977] 2 Can LRBR 148; and 77 CLLC 16,087 (CLRBR no. 85), the reasons that led the Board to deny the request for withdrawal were of a different nature. The union had requested a withdrawal, after learning that the Board officer had discovered irregularities relating to compliance with the evidence of membership provisions of the Regulations. Given the circumstances of that particular case, the Board denied the request for withdrawal.

The Labour Relations Board of British Columbia has also examined the circumstances in which a request for withdrawal should or should not be granted. In British Columbia, the Labour Code stipulates that a union must obtain permission from the Board to withdraw an application for certification and that the Board has the discretionary power to deal with this request. In Britco Structures Ltd. (1984), 4 CLRBR (NS) 5, the B.C. Board said this:

"In our view, an applicant trade union must present valid labour relations reasons for seeking a withdrawal - reasons such as those articulated by the Board in Universal Supply Co., *supra*. Here the locals have advanced no reason for the application for withdrawal and none, such as an ignorance of the size of the employer's operation, is evident from the file. ..."

(page 8)

In the case cited, Universal Supply Co. (Surrey) Ltd., L140/81, August 6, 1981, the B.C. Board dealt with the issue as follows:

"... After a trade union has submitted an application for certification, it will often discover that the proposed bargaining unit is much larger than it had understood or, because of certain features of the employer's operations of which it was not previously cognizant, the proposed bargaining unit is not appropriate for the collective bargaining purposes. The frequency of such situations is the inevitable product of the reality that details of an employer's organizational structure are not always available to a trade union. Upon discovering a flaw of this nature in its application, a trade union will usually seek to withdraw its application so that another, more appropriate application may be filed ...

Where there is no prejudice to the employer and the Board has not already ordered a representation vote (see section 43(2) of the Labour Code), the Board will normally permit the withdrawal of a certification application. In these circumstances the Board will also normally accept and process another application. If the Board is satisfied that withdrawal and application will prejudice an employer by causing a significant disruption in its operations, the Board may withhold permission to withdraw."

(pages 7-8)

[Concerning the effect of the withdrawal of an application for certification and the criteria governing the exercise of discretion, see also a recent Board decision, Greyhound Lines of Canada Ltd. (1990), 90 CLLC 16,029 (CLRB no. 794).]

An examination of the Code and the case law reveals two factors that the Board must consider when it examines a request for withdrawal. First, where a party institutes a

ceeding before the Board and then wishes to withdraw its proceeding, this withdrawal is not automatic: the Board has the discretionary power to grant or deny this request. Second, the Board must exercise its discretion on the basis of criteria and conditions that promote the practise and protection of sound labour relations, while ensuring compliance with the legislative and regulatory provisions.

In the present case, the Board denied the applicant's request for withdrawal because, in its opinion, the situation revealed by the officer's investigation did not warrant the withdrawal of this application for certification, but obliged the Board to examine its merits. This examination led the Board to dismiss the application for certification because it did not meet the criteria established by the Code and the Board's Regulations.

2. The irregularities relating to the applicant's representative character

(a) The nature and importance of the irregularities noted

The Board officer's investigation revealed two types of irregularities.

The first type relates to the failure of certain employees to personally pay the sum of \$5.00 when they signed their membership cards, contrary to section 27(b) of the Board's Regulations. The second type, which is much more serious, results from the falsification of employee signatures on certain membership cards submitted by the applicant in support of its application for certification.

An examination of the results of the investigation conducted by the Board reveals the following. Thirty-one persons, representing 47.7% of the employer's employees in respect of whom the applicant union submitted evidence of membership, were questioned. These employees signed written statements concerning the conditions and circumstances of their joining one or the other of the associations concerned. Eleven of these persons did not pay the required sum of \$5.00 when they signed their membership cards in the applicant union. Moreover, five persons stated that they never joined this union. The membership cards submitted on their behalf proved to be fraudulent because the signatures appearing on these cards were not those of the employees in question. It thus appears that in 17 cases, not only did the evidence of membership not meet the requirements of the Board's Regulations, but also certain membership cards constitute, at least at first glance, acts of fraud. These 17 questionable cases represent 25.8% of the membership cards submitted by the applicant in support of its application.

The Board felt that because of the seriousness and the high percentage of irregularities or errors, and because the applicant did not provide a valid explanation or justification, it could not grant the request for withdrawal. The Board examined the merits of the application for certification and decided to dismiss it because this application did not meet the minimum requirements of the Code and the Regulations pertaining to representative character.

The representative character of an employee association is a matter of public policy. From it derives a union's exclusive right of representation, with all the consequences

this right entails; for this reason, it must be carefully scrutinized. The Board decision of April 20, 1990 is based on the position adopted in Air West Airlines Ltd. (Air West Operations Ltd.) (1980), 39 di 56; and [1980] 2 Can LRBR 197 (CLRB no. 231). In that case, the Board, after noting that at least 10 employees had not personally paid the sum of \$5.00, stated the following:

"... Such representation by the Association to the Board casts such a doubt on the operations of the Association to obtain membership that the Board cannot rely on any of the evidence received from the Association claiming that employees were members of their Association. ...

The Board, if it had known of the Association's misrepresentations at the outset, would have never ordered a vote and would have dismissed their application outright. ..."

(pages 88; and 223)

Over the years, the Board has established work methods and flexible rules to ensure compliance with the Code and Regulations in disposing of applications for certification made to it. It has thus tried to ensure that the free exercise of the right of association and the establishment of effective labour relations are not hindered by rules that place too much emphasis on formality. It is nevertheless essential that the requirements and procedures for determining the representative character of a union seeking certification continue to be observed and applied constantly and strictly. [For a review of the relevant provisions of the Code and the Regulations, see Radio CHNC Limitée, New Carlisle (1985), 63 di 26; 12 CLRBR (NS) 112; and 86 CLLC 16,009 (CLRB no. 537).]

(b) The reasons given by the applicant

In reply to the Board's request to explain and comment on the situation revealed by the record, the applicant informed the Board of its intention to withdraw its proceeding, without further explanation. Following another request from the Board, the applicant made known its comments and arguments on April 12, 1990. (see page 5 of these reasons).

The reasons given by the union do not satisfy the Board. The allegation that the irregularities in question occurred without the knowledge of Local 1999 or its representatives does not constitute in the instant case a valid explanation or justification. Given the nature and number of irregularities noted, the applicant cannot merely argue, to explain the situation, that its principal representatives were not aware of what was happening. For the moment, the Board cannot dismiss this statement or question the facts and events alleged in the April 12 reply. However, it cannot help but note that it was one of the applicant's principal representatives, in this case the vice-president, who on February 27, 1990 signed the certificate of accuracy required by the Board. The record shows that this officer did not personally witness the signing of any membership cards. The practice of having the certificate of accuracy signed by an authorized person who did not necessarily participate in recruiting members is a common one that makes sense in union organizing activities, particularly where large bargaining units are involved. However, in these circumstances, the union must be able to show that it properly instructed its agents and took effective measures to ensure that the whole process meets the legal requirements.

however, the person signing the certificate of accuracy need not be required to personally vouch for all the signatures on the membership cards. This approach would place too much emphasis on formality and would needlessly impede the exercise of the right of association. The person signing the certificate of accuracy must nevertheless ensure, by means that he deems appropriate but whose effectiveness is beyond question, that the membership cards, whose authenticity and compliance with the Board's Regulations he certifies, meet the established criteria.

In Reimer Express Lines Ltd. et al. (1979), 38 di 213; and [1981] 1 Can LRBR 336 (CLRB no. 226), the Board issued the following reminder:

"... By virtue of section 126 of the Code, the Board is mandated to place great weight on the wishes of employees as of the date of application as expressed by signed applications for membership complemented by documentary evidence of a monetary commitment. Officers of unions filing such documents are required to attest to their authenticity. In this case, we have evidence of application cards being witnessed by persons who were not present when they were signed. Also, receipts show payment of initiation fees on specific dates, which payment has now been refuted in evidence. This type of conduct cannot be tolerated when the Board relies so greatly on the accuracy of such documents.

Persons dealing with the Board are hereby sternly warned to be aware of the importance of membership evidence. Attempts to deceive the Board in any fashion will not be tolerated. Such improprieties may be fatal to an application."

(pages 226; and 347; emphasis added)

[In the same vein, see Cape Breton Development Corporation, supra, pages 304; 150; and 493.]

On the same subject, in Ontario Taxi Association 1688, [1981] 3 Can LRBR 451, the Ontario Labour Relations Board,

after determining that a fraud had been committed, i.e. forging signatures on membership cards, stated:

"To establish a fraud under section 50, it must be demonstrated that a false representation was made to the Board which the Board relied on and also that the representation was known, or ought reasonably to have been known by the purveyor thereof to be false. ...

... In particular, if the union is not to have its bargaining rights terminated it should be able to demonstrate that the fraud was an isolated matter unknown to any responsible officers or officials of the union, that union officials took reasonable steps to ensure that membership evidence would be properly obtained, and that at the end of the organizing campaign the type of inquiries called for on the Form 8 declaration concerning membership documents filed by the union were in fact made."

(pages 455-456; emphasis added)

The Board does not capriciously require unions seeking certification to provide it with a statement (certificate of accuracy) certifying that the conditions governing the securing of the membership of employees in a union and the evidence of these memberships have been understood and met. The unions are first and foremost responsible for this fundamental aspect of the certification process and they must be able to guarantee compliance with the Code and Regulations during their campaigns to sign up members.

In the same vein, forging signatures on five membership cards submitted to the Board is inexcusable and intolerable. The Board has already had the opportunity to enunciate the principles that apply in this situation. In K.D. Marine Transport Ltd. (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400), it said the following:

"The Board is fully cognizant of the importance of proof of union membership and the great weight and reliance placed upon the authenticity of such documentary evidence of employee wishes. Any fraud or tampering with membership cards or records such as signatures, backdated or updated cards, or falsehood in the method of payment of

the required initiation fee, will result in *swift and severe consequences*. ..."

(pages 144; and 14,076)

In Canadian Protection Services, August 15, 1988 (LD 675), the Board, in disposing of an application for revocation, listed the situations where the Board could consider a certification order to have been obtained fraudulently and revoke it:

"... For example, section 139 would apply where documents have been falsified to gain trade union status under the Code or, in the area of organizing, where signatures have been forged on membership cards or where dates on cards or receipts have been tampered with or, where the required initiation fees have not been paid and the responsible union officer knowingly affirms to the Board that they have been paid."

(page 6)

The Board is applying these principles in the instant case. As we stated earlier, the applicant union is responsible for the entire union organizing process, from start to finish. If it is granted certification, it will exercise the rights and obligations that accompany certification, in particular bargaining and the interpretation and administration of the collective agreement. These responsibilities require that the union demonstrate its good faith at each and every step of the process leading to the issuing of a certification order. However, unintentional or minor errors may occur and mistakes made by inexperienced or inadequately informed employees or union representatives may result in irregularities that are unlikely to have any repercussions on the union organizing process.

The nature and scope of the irregularities noted in this case do not enable the Board to conclude that there were no serious repercussions on the organizing process at issue

here. The Board cannot therefore simply disregard the invalid memberships and subtract them from the total number of memberships submitted in determining whether the applicant possesses the representative character and then deciding whether it should be granted certification. Nor can the Board, as the applicant suggests, simply grant its request for withdrawal, because this would mean a return to the situation that existed before the application for certification was made. [See Greyhound Lines of Canada, supra, page 14,254.] Fundamental irregularities were committed in the present case and the Board has no alternative but to dismiss this application outright.

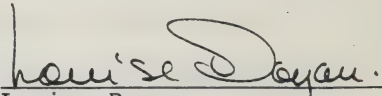
III

Conclusion

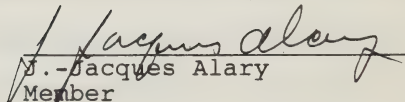
The Board considers it essential that the provisions of the Code and Regulations be applied fully and constantly. It has always interpreted and applied the Code strictly, and rightly so, in order to ensure the free exercise of the right of association. One means to this end has been to maintain the confidentiality of union allegiance, the effect of which is to exclude the employer from part of the investigation that attends an application for certification (see Réseau de Télévision Quatre Saisons Inc. (1990), 90 CLLC 16,047 (CLRB no. 779)). There is ample justification for this practice and it must continue. At the same time, however, the Board must take steps to ensure that the right of association is in fact freely exercised in accordance with the Code. In situations like those revealed in the present case, this right of association is not exercised freely. Moreover, the applicant did not provide, in support

its request for withdrawal, one valid reason that would promote the development of sound labour relations.

Accordingly, the Board denied the request for withdrawal and dismissed the application for certification.


Louise Doyon
Vice-Chair


Ginette Gosselin
Member


J.-Jacques Alary
Member

ISSUED at Ottawa, this 19th day of July 1990.

information

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Résumé de Décision

MADAME ELISE GARIÉPY,
PLAIGNANTE, ET EXECUTIVE
SECURITY SERVICES LTD., INTIMÉE.

Dossier du Conseil: 745-3398

N° de décision: 813

This is not an official document. Only the reasons for Decision can be used for legal purposes.

Summary

MRS. ÉLISE GARIÉPY, COMPLAINANT,
AND EXECUTIVE SECURITY SERVICES
LTD., RESPONDENT.

Board File: 745-3398

Decision no.: 813

Il s'agit d'une plainte de pratique déloyale de travail alléguant que l'employeur a congédié la plaignante en violation des dispositions du sous-alinéa 94(3)a(i) du Code.

La plaignante a été congédiée quelques jours après son élection à un poste au comité exécutif du syndicat et la présentation d'une demande d'accréditation. Elle était alors en période de probation.

Le Conseil a fait droit à la plainte et a ordonné la réintégration de la plaignante dans ses fonctions.

This case deals with a complaint of unfair labour practice alleging that the employer dismissed the complainant in contravention of section 94(3) (a) (i) of the Code.

The complainant was dismissed a few days after being elected to an executive position in the union and following the filing of an application for certification. She was on probation at that time.

The Board granted the complaint and ordered the complainant's reinstatement.



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Reasons for decision

Elise Gariépy,
complainant,

and

Executive Security Services
Ltd.,

respondent.

Board File: 745-3398

The Board was composed of Ms. Louise Doyon, Vice-Chair, as well as Ms. Linda M. Parsons and Ms. Ginette Gosselin, Members.

Appearances:

Mr. Marc Lebeau, for the complainant; and
Mr. Paul A. Venne, for the respondent.

These reasons for decision were written by Ms. Ginette Gosselin, Member.

A hearing was held on January 16 and March 13, 1990 in Montreal.

I

On September 8, 1989, Elise Gariépy filed a complaint alleging that her employer, Executive Security Services Ltd. (the employer or Executive), had dismissed her contrary to the provisions of section 94(3)(a)(i) of the Code.

Executive denied having violated the Code and argued that Ms. Gariépy had been dismissed for just and sufficient cause that had nothing to do with her union activities. It relied on two particular incidents to justify its decision.

II

When she was dismissed on September 5, 1989, Ms. Gariépy had been in the employer's service since September 1, 1989. However, she had worked as a security officer at Mirabel since October 1987, when she was hired by Aeroguard Security. The contract between the latter company and the air carriers at Mirabel expired on August 31, 1989 and, on the following day, Executive took over and kept in its employ about 95% of Aeroguard's employees, including the complainant.

Like all other Aeroguard employees wishing to keep their jobs at Mirabel, the complainant met with a manager of Executive at a selection interview in early August. This meeting was positive and in late August it was confirmed that she had been hired.

On August 28 and 29, 1989, Executive held information sessions for its future employees. Five of its representatives, including Richard Keith, who was to be Executive's manager at Mirabel from September 1, 1989, conducted these meetings. Ms. Gariépy was invited to and took part in the meeting held on August 29. On that date the question of the union was discussed, among other things. A representative of Executive informed the employees that the Teamsters union would probably meet with them since it was the bargaining agent recognized by the company elsewhere in the country. Ms. Gariépy spoke on this point and asked questions. Mr. Keith remembered meeting her at the session.

On the same day the Union des agents de sécurité du Québec, Local 8922 of the United Steelworkers of America (the Union), the certified bargaining agent for Aeroguard

employees at Mirabel, held a meeting. At this meeting, at which attended about 50 of the future employees of Executive, Ms. Gariépy was elected steward of the Union's local. It was also decided at this meeting that the Union would take action to be certified as bargaining agent for Executive employees at Mirabel. Membership cards were then signed and, on September 1, 1989, the Union filed an application for certification with the Board (file 555-2999). At the time Ms. Gariépy was dismissed, Executive had not been officially notified of the names of the union officers.

The complainant worked from September 1 to 4 inclusive. On September 1 she and all her colleagues signed a document acknowledging that they were employees on probation for three months.

On September 2 rumours concerning possible changes in the work schedule circulated. On September 3 one of the supervisors, Colette Ross, informed the complainant that the employer had decided from now on to offer a 40-hour work week and all weekends free to married employees. This news alarmed Ms. Gariépy. As she explained to the Board, she considered this measure to be discriminatory to unmarried employees. Other issues also concerned the employees, the most important of which were salaries and the identity of their future bargaining agent. These questions were discussed during coffee and meal breaks that the employees, security officers and supervisors took together. As union steward, Ms. Gariépy was often consulted by her colleagues on all these questions.

It was also on September 3 that the first incident alleged against Ms. Gariépy occurred. The relevant evidence was contradictory.

According to the complainant, she and a colleague reported to the search point after their coffee break; each had a glass of coke in her hand. Colette Ross, the supervisor that evening, allegedly ordered her to get rid of it immediately without requiring the same of her colleague. The complainant, who was aware that Executive's regulations forbade employees to drink, eat or smoke at the work place, said that she hurriedly drank her Coke in the cloakroom at the search point and returned to work immediately.

Ms. Ross's version was different. She ordered both employees to stop drinking and only Ms. Gariépy disobeyed. The other employee threw her glass away without drinking it.

That was the first incident.

The testimony concerning the second incident was also contradictory.

Ms. Gariépy said that before her shift began on September 4 she informed the supervisor that she wished to speak to the manager, Mr. Keith, concerning scheduling since colleagues had mentioned their concerns to her in this regard. He met with her at about 7:00 p.m. during her coffee break. She was smoking a cigarette in the baggage room. On this point Ms. Gariépy submitted that the prohibition on smoking did not apply to the location where she was taking her coffee break. The meeting was very brief. There was a sharp exchange of words and Ms. Gariépy

was summoned by Mr. Keith to an official meeting on the following day.

On this subject Ms. Ross testified that the complainant refused to work while waiting for Mr. Keith and smoked in a location where employees were forbidden to do so.

On September 5 Ms. Gariépy again met with Mr. Keith. He was accompanied by Catherine Savard, Chief Supervisor, and Colette Ross, Supervisor. Ms. Gariépy raised the question of scheduling and Mr. Keith again brought up the incident involving the coke and the incident of the previous day. Voices were raised and Ms. Gariépy allegedly said that she had worked that way before and wished to continue working that way. Mr. Keith put an end to the meeting and announced that the complainant's employment was terminated.

Ms. Gariépy did not personally inform Mr. Keith that she was representing her colleagues and that it was in this capacity that she wished to speak to him about scheduling. She saw no point in mentioning the union since her very recent election was known to everybody in Executive. Ms. Ross and Mr. Keith said that they knew nothing about the complainant's union activities.

III

Section 94(3)(a)(i) provides:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,..."

This section of the Code has been the subject of a number of Board decisions, and the interpretation given to it is now well known. In Yellowknife District Hospital Society et al. (1977), 20 di 281; 77 CLLC 16,083 (CLRB no. 82), the Board explained it as follows:

"... It is a rare experience for labour relations boards to hear an employer who cannot advance justification for his act -- e.g. failure to report to work one day, an act of insubordination to a superior, or merely a reevaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is one contemplated by section 184(3), he will be found to have committed an unfair labour practice."

(pages 284-285; and 461)

(See also Rapide Transport Inc. (1986), 64 di 135 (CLRB no. 561); and Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600).) The employer cannot merely show the existence of a sufficient cause to justify the action taken. The Board must be satisfied that the cause alleged to be just and sufficient is not a pretext for the expression of anti-union animus.

Section 98(4) of the Code reads as follows:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

There is accordingly a presumption in the complainant's favour, although the employer may rebut it on a balance of probabilities. (See in this regard Rapide Transport Inc., supra.)

Finally, section 99 of the Code gives the Board powers to grant relief.

IV

The employer denied dismissing the complainant on account of her union activities. It says that it was not even aware of them. It contended that its decision was based solely on the two above-mentioned incidents involving Ms. Gariépy. Finally, the employer added that in this case the Board should take into account the fact that the complainant was on probation when she was dismissed since the case law gave employers greater room to manoeuvre in disciplinary matters in such situations.

The evidence concerning important aspects of this case and the two incidents leading to the dismissal was contradictory. The complainant maintained that the employer could not have been unaware of her union activities, although it denies this. However, this was not the first time that such a situation had arisen. The Board noted the following in Air Atlantic Limited, supra:

"Seldom is there direct evidence of anti-union animus in section 184(3)(a) complaints, rarely do employers stand up and admit that their actions were motivated by an underlying desire to operate their business without the encumbrance of collective bargaining. More often than not the issues come down to credibility and the cases turn on what the Board sees as the reasonable balance of probabilities given the circumstances before it. ..."

(pages 36; and 14,008)

An analysis of the facts in this case does not support the employer's arguments. Although they did not know exactly what Ms. Gariépy's business with the union was, the representatives of Executive knew that she was an active member. The manager, Mr. Keith, remembered that she had attended the information session on August 29. We noted that Ms. Gariépy spoke at this meeting specifically during the discussion concerning the union. Moreover, there were frequent discussions on this topic throughout the period in question, given the application for certification filed by the Union, rumours concerning the Teamsters and the uncertainty surrounding certain conditions of employment. These discussions took place openly and publicly either at the work place or in the cafeteria and the complainant took an active part in them. She was also regarded as a resource person by some of her colleagues in this respect. In the particular context of this period it seems unlikely that the employer's representatives would not have known that Ms. Gariépy was one of the Union officers.

The very way in which the dismissal took place persuades us that the employer wished to take the opportunity provided by the complainant's indiscretions to get rid of a militant union member. She was given no advance notice and was not given an opportunity to mend her ways. She was dismissed

on the spot at a meeting that she believed was intended primarily to discuss scheduling problems since it was a continuation of the meeting of the previous day.

The fact that Ms. Gariépy was then on probation could not justify this approach. If it is true, and this is not at issue here, that an employer has greater latitude in disciplinary matters when employees are on probation, such latitude does not extend to discriminatory acts. Since section 94(3) of the Code forbids employers to refuse to employ a person for any of the reasons listed, it certainly does not authorize dismissal for any of those reasons during the probationary period.

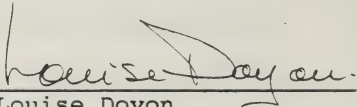
For these reasons, the Board concluded that the employer did not succeed in proving that it had not dismissed Ms. Gariépy on a ground prohibited by the Code and grants the complaint.

Consequently, pursuant to the powers conferred by section 89, the Board orders the employer

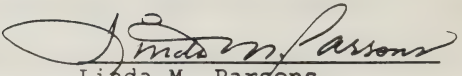
- to reinstate Ms. Gariépy immediately in the position she held prior to her dismissal;
- to pay her compensation equivalent to the remuneration she would have been paid from September 5, 1989 to the date of her reinstatement, minus the sums earned elsewhere; and
- to remove any mention of the disciplinary action from the complainant's file.

The Board appoints Serge Quesnel of the Montréal Regional Office to assist the parties in implementing this decision and retains jurisdiction in case the parties fail to reach an agreement.

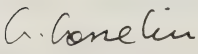
This decision is unanimous.



Louise Doyon
Vice-Chair



Linda M. Parsons
Member



Ginette Gosselin
Member

DATED at Ottawa, this 26th day of July 1990.

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Résumé de Décision

NICOLE MONETTE, PLAIGNANTE, ET
LA FRATERNITÉ DES WAGONNIERS
DE CHEMIN DE FER DU CANADA,
INTIMÉE, ET VIA RAIL CANADA INC.
EMPLOYEUR.

Dossier du Conseil: 745-3496

N^o de décision: 814

Summary

NICOLE MONETTE, COMPLAINANT,
THE BROTHERHOOD RAILWAY
CARMEN OF CANADA, RESPONDENT,
AND VIA RAIL CANADA INC.,
EMPLOYER.

Board File: 745-3496

Decision no.: 814

Plainte de violation du devoir de
représentation juste (article 37 du Code
canadien du travail (Partie I - Relations du
travail)) faisant suite à la décision du
syndicat de ne pas porter à l'arbitrage le
grief de congédiement de la plaignante.
Objection de prescription soulevée par le
syndicat. Plainte rejetée.

Le Conseil a jugé que le syndicat n'avait pas
agit de manière discriminatoire, arbitraire,
ou de mauvaise foi dans le traitement de ce
grief, tant au cours de son enquête initiale
que lors du réexamen du bien-fondé du
grief dans le cadre de sa procédure d'appel
interne. Compte tenu de cette conclusion
sur le bien-fondé de la plainte, le Conseil
juge qu'il n'y a pas lieu de trancher la
question de la prescription.

This case deals with a complaint of breach
of the duty of fair representation provided
in section 37 of the Canada Labour Code
(Part I - Industrial Relations), following the
union's decision not to refer the
complainant's dismissal grievance to
arbitration. The union raised an objection
concerning the timeliness of the complaint.
The complaint is dismissed.

The Board determined that the union had
not acted in a discriminatory, arbitrary
fashion or in bad faith in processing the
grievance, i.e. in its initial investigation of
the grievance and in its examination of the
merits during the internal appeal procedure.
Given this finding on the merits of the
complaint, the Board considers that it need
not deal with the issue of timeliness.



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Conseil
canadien des
relations du
travail

Reasons for decision

Nicole Monette,
complainant,
and
Brotherhood of Railway Carmen
of Canada,
respondent,
and
VIA Rail Canada Inc.,
employer.

Board File: 745-3496

The Board was composed of Ms. Louise Doyon, Vice-Chair, as well as Ms. Evelyn Bourassa and Ms. Ginette Gosselin, Members.

Appearances:

Ms. Mariette Pilon, for the complainant;
Mr. Sean T. McGee, accompanied by Mr. Tom Wood, for the union; and
Mr. Dominic Scalia, accompanied by Mr. Keith Pride, Director of Labour Relations for VIA Rail Canada Inc., for the employer.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

The parties were heard in Montréal on June 21 and 22, 1990.

I

The Dispute

On December 27, 1989 Nicole Monette filed a complaint of unfair labour practice under section 97(1) of the Canada Labour Code (Part I - Industrial Relations), alleging that

a respondent union breached its duty of fair representation provided for in section 37 of the Code. This section reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

Ms. Monette argued that the union acted contrary to this provision of the Code in handling her grievance against her dismissal as it did, especially in the way in which it investigated this grievance during the months from June to September 1989. In fact, after asking the complainant in June 1989 to provide additional information to enable it to continue its examination of her grievance, the union apparently failed to conduct a full investigation on the basis of this information. Consequently, it had not been sufficiently attentive and diligent in handling her grievance. Since the decision of the union's Joint Protective Board in September 1989 not to refer Ms. Monette's grievance to arbitration was based on the results of this investigation, the complainant concluded that section 37 of the Code had been violated.

The union, on the other hand, argued that the complaint was filed outside the 90-day time limit provided in section 97(1) of the Code since it was filed on December 27, 1989. In the union's view, the decision not to refer Ms. Monette's dismissal grievance to arbitration was made on May 17, 1989 by Tom Wood, System Director General, and not at the meeting of the union's Joint Protective Board in September 1989. Mr. Wood's letter stating the reasons for his decision was given to Ms. Monette on or about June 1, 1989 by Fernand Gadbois, the respondent union's Director General for the St. Lawrence Region. The union added that, when it

reexamined the merits of Ms. Monette's grievance during the summer of 1989, it did so at the time of and in accordance with the union's internal appeal procedure, on which the complainant relied. According to the Board's case law, the starting date for calculating the period provided in section 97(2) for filing a complaint alleging a violation of section 37 of the Code is the date of the union's decision, in this case May 17, 1989, disregarding the time that elapses where an employee avails himself of the union's appeal process under internal procedural rules. (See Donald McIntyre (1987), 72 di 127; 19 CLRBR (NS) 196; and 88 CLLC 16,002 (CLRBR no. 665); Frederick B. Billington (1981), 45 di 247 (CLRBR no. 338).) Subsidiarily, the union argued that it had at all times correctly fulfilled its duty of fair representation in the way in which it handled Ms. Monette's dismissal grievance.

In reply to the argument that her complaint was untimely, the complainant argued that the union's actions during the summer of 1989 showed that it undertook a new investigation at that time and did not merely review the case. According to the complainant, the fact that the union asked her in June 1989 for further information that might disclose new evidence to support her claims and thus might bring about a change in the decision not to refer the grievance to arbitration meant that the union decided at that time to conduct a new investigation and to review her case. This approach did not in any way meet the review criteria applicable in an internal appeal procedure. Consequently, the complaint was filed within the time limit provided in the Code, namely, 90 days from the time when the complainant was informed of the decision made in September 1989, in her case on October 24, 1989.

II

The Evidence

The timeliness objection and the complainant's reply to this objection raise several questions of fact relating to the whole process followed by the union in handling Ms. Monette's grievance. At the hearing the Board accordingly asked the parties not only to submit evidence to support their arguments concerning the events that occurred during the summer of 1989 and the impact of these events on a possible untimely complaint, but also to submit evidence relating to all the events that occurred between the date on which Ms. Monette's grievance was filed and October 24, 1989.

The main factors that emerged from the evidence were as follows.

1. Nicole Monette started working for the employer on July 23, 1988 as a car maintenance employee. She was dismissed on October 13, 1988 while still on probation.
2. The Local president informed the Director General for the St. Lawrence Region, Fernand Gadbois, of this situation. The latter drafted a grievance against Ms. Monette's dismissal and undertook to see the grievance through all steps of the grievance procedure provided for in the collective agreement. Throughout this period Mr. Gadbois was in touch with the complainant to ensure that her grievance was processed. Ms. Monette stated that she was satisfied with the union's behaviour from the time she filed her grievance to the time she received the letter dated May 17 from Tom Wood. In fact, she had no criticism of the union's behaviour during this period, except that she was

obviously not in agreement with its decision to withdraw her grievance from arbitration.

3. The employer's final reply rejecting the grievance was sent to the union on January 12, 1989 following a meeting of the labour-management committee on January 6, 1989. Tom Wood, Fernand Gadbois and Keith Pride, Director of Labour Relations for VIA Rail, and the latter's assistant were present at this meeting.
4. Between January 12, 1989 and late September 1989 the union asked the employer on several occasions for extensions of the 60-day period for referring the grievance to arbitration. In all cases the employer granted these requests.
5. The letter dated May 17, 1989 and signed by Tom Wood indicated that he was withdrawing the grievance from arbitration and he gave the reasons for his decision. On the one hand, following a review of Ms. Monette's employment record, the circumstances leading to the dismissal and the reasons therefor, the union had not been able to conclude that the employer had violated the collective agreement. On the other hand, since Ms. Monette was on probation, the union had decided on the basis of a legal opinion obtained concerning the chances of success of a dismissal grievance in the circumstances that there was no reason to proceed to arbitration.
6. On receiving this letter, Ms. Monette decided, as Mr. Wood had suggested, to appeal to the union's Joint Protective Board. Following her meeting with the members of this authority on June 4, 1989, the union asked her to provide additional information to help in

handling her grievance, if she possibly could. The decision of the union's Joint Protective Board concerning the complainant's grievance was then suspended.

7. During the summer of 1989 Fernand Gadbois remained in touch with Ms. Monette. She gave him a list of persons who might provide information to support her claims of harassment and discrimination, to which she claimed to have been subject at work.

During this period Mr. Gadbois telephoned the persons whose names had been given by the complainant or, at the very least, he attempted to do so. Not one of them was able to give him additional information or information that differed from that which was already on file or new evidence that might have served as a basis for a reexamination of the decision not to refer the grievance to arbitration. Mr. Gadbois felt there was no point in meeting with these persons since, in his view, they could not help Ms. Monette.

8. During this period Tom Wood also telephoned the complainant and various persons whose names she had given him. Like Mr. Gadbois, he felt that none of them would be of any help to Ms. Monette.
9. At the meeting in Ottawa in the week of September 24 to 28, 1989 the union's Joint Protective Board continued the review of Ms. Monette's grievance. It upheld the decision made by Tom Wood on May 17, 1989. The complainant was informed on October 24, 1989 in an explanatory letter from Tom Wood.

III

The Decision

The Board considered all evidence and representations filed by the parties with respect to the alleged untimeliness of the complaint and to the union's behaviour in this case. The Board feels that the union did not breach its duty of fair representation at any period during which it was handling the complainant's grievance. Given our finding on the merits of the complaint, the Board has no reason to deal with the question whether, as was submitted by the union, Ms. Monette's complaint was filed outside the time limit provided for in the Code.

First, the Board notes, and Ms. Monette admits, that the manner in which the union conducted itself toward the complainant from the time her dismissal grievance was filed to May 17, 1989, when the System Director General informed her of his decision not to refer the grievance to arbitration, was not contrary to the provisions of section 37 of the Code. At that time the union investigated and handled Ms. Monette's dismissal grievance in accordance with the criteria applicable to its duty of fair representation. Mr. Wood made his decision following his examination of the results of his investigation and after finding that Ms. Monette's probationary employee status was a major handicap in this case.

Second, and subject to the timeliness objection, the Board feels that the way in which the union dealt with the information provided by Ms. Monette after June 4, 1989 met the requirements of the Code concerning fair representation. Fernand Gadbois was in touch with the complainant throughout this period and contacted the persons whose names he had obtained to determine how they might be able to support

Ms. Monette's claims concerning the unlawful nature of her dismissal. It is true, as was stated by Ms. Monette, that Mr. Gadbois did not meet these persons to question them. However, this particular requirement expressed here by the complainant was not a test on the basis of which the Board could rule that the union acted in a manner that was arbitrary, discriminatory or in bad faith in handling her grievance. Moreover, Tom Wood was also in touch with the complainant and with certain persons whose names he had obtained during the summer of 1989. According to his testimony the persons questioned were not able to provide additional information that might have led the union's Joint Protective Board to change the decision it had made on May 17, 1989.

The Board's case law concerning the duty of fair representation is voluminous and, to the extent that fundamental issues are at stake, it is constant. In this regard we should note André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319), where the Board clearly indicated that a union was not required to refer a grievance to arbitration. However, when it makes the necessary decision, the union must exercise its discretion in a reasonable and informed manner after conducting a full investigation of all the various aspects of the case. It was this principle, inter alia, that was approved by the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, and that it repeated very recently in Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330 (page 1347 et seq). In fact, as the Board noted in Robert Lacoste and Marcel Leduc (1988), 73 di 160; and 89 CLLC 16,001 (CLRB no. 680):

"In short, it is not the substance or the merits of the grievance that matters; the Board examines these aspects merely to obtain a better understanding of the facts that gave rise to the

grievances. This enables the Board to determine the atmosphere, background and setting. What matters is the behaviour of the union and its officers in processing the grievance. This behaviour must be serious, responsible, diligent, and devoid of any arbitrariness, bad faith and discrimination."

(pages 170; and 14,006)

(See Jacques Poitras (1986), 63 di 183 (CLRB no. 546), and Lionel Arseneault (1988), 74 di 63 (CLRB no. 692).)

The Board accordingly finds that the complainant did not show that the union acted in a manner that was discriminatory, arbitrary or in bad faith in handling her dismissal grievance.

For all these reasons the Board dismisses Ms. Monette's complaint of unfair labour practice.

This is a unanimous decision of the Board.


Louise Doyon
Vice-Chair


Evelyn Bourassa
Member


Ginette Gosselin
Member

DATED at Ottawa, this 30th day of July 1990.

